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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1115

J. W. HAMPTON, JR., & CO., PETITIONER,

v.

THE UNITED STATES, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS AND BRIEF IN SUPPORT THEREOF.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Customs Appeals in the above-entitled cause, rendered February 24, 1927 (R., 102); mandate March 26, 1927 (R., 102).

The petitioner relies on Art. III, Sec. II, Constitution, and Section 195 (36 Stat., 1145) of the Judicial Code, as amended August 22, 1914, c. 267 (38 Stat., 703), as amended September 6, 1916, Sec. 6 (39 Stat.,

726, 727). Note United States *v.* Lippmann, 260 U. S., 742.

On October 16, 1926, prior to the decision of the U. S. Court of Customs Appeals, the Attorney General filed with the clerk of said court a certificate provided for in Section 195, certifying that in his opinion this case is of such importance as to render expedient its review by the Supreme Court (R., 76).

Summary.—Statement.

This case squarely and correctly raises the constitutionality of Sec. 315 of the Tariff Act of September 21, 1922 (42 Stat., 358, 941). This is the so-called flexible-tariff provision. There is a monetary interest involved to recover duties paid to a collector of customs (New York, N. Y.), who assessed by virtue of the proclamation of the President (R., 15), (45 Treas. Dec. 669, T. D. 40216, R., 79), which raised the statutory rate of four (4) cents per pound (par. 12, 42 Stat., 860) on barium dioxide to six (6) cents per pound.

Protest and appeal were made (Sec. 514, Part 3, Title IV, 42 Stat., 969/70), and the case came on for trial before the Board of United States General Appraisers (now the United States Customs Court (44 Stat., 669, c. 411, Secs. 1, 2, Part 1, 49 Treas. Dec., 943, T. D. 41616).

A majority held the act constitutional (R., 12; dissent R., 44). Thereafter, on appeal to the United States Court of Customs Appeals, the lower court was affirmed (R., 102).

Question Presented.

The protest (R., 8, 9), set up the following:

> "We claim that the merchandise is properly dutiable at four (4) cents per pound, under paragraph 12, of the Tariff Act of September 21, 1922.
>
> "We further claim that if the assessment and liquidation of duty is purposed to be made by authority of the President under section 315, etc., Title III, of said act, it is unconstitutional and void; that the President's proclamation dated May 19, 1924, T. D. 40216, is unconstitutional and void:
>
> "(1) Because it is done under and by virtue of an illegal delegation to the Executive Department of the power to legislate, which power, by the Federal Constitution, is solely committed to Congress.
>
> Article I.
>
> "SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."
>
> "(2) Because it is done under an illegal delegation to the Executive Department of the power to tax, which power is alone lodged in the Congress of the United States by
>
> "SECTION 8. The Congress shall have power to lay and collect taxes, duties, imposts and excises, * * *."

"(3) Even if in form it has been done by constitutional delegation of legislative power and of the taxing power, it purports on its face to make a levy, not for raising public revenue, but under a declared policy for protection to American industries, based upon difference of cost of production at home and abroad, which is not a tax or duty within the meaning of the Federal Constitution.

"We further claim that your action and decision, the acts of the Tariff Commission, and the act of the President of the United States, are singly, and collectively, null and void, being unconstitutional; that is to say, being contrary to the express provisions of the Federal Constitution and the specific grants of power bestowed only and contained in said Constitution."

Statutes Involved.

Tariff Act of September, 1922, Title I, par. 12 (42 Stat., 860):

"* * *; barium dioxide, 4 cents per pound, * * *."

Title III, Sec. 315 (42 Stat., 358, 941):

SEC. 315 (*a*). That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product or competing foreign coun-

tries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, that the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(*b*) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in cost of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the

said differences in costs of production in the United States and the principal competing country cannot be equalized by proceeding under the provisions of subdivision (*a*) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation by the President becoming effective the *ad valorem* duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (*f*) of section 402 of this Act of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under subdivision (*b*) of this section.

The *ad valorem* rate or rates of duty based up such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine

Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraph (1), (2), and (3) of subdivision (*a*) of section 402 of this Act.

(*c*) That in ascertaining the differences in costs of production under the provisions of subdivisions (*a*) and (*b*) of this section, the President in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evi-

dence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified *ad valorem* rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum *ad valorem* rate so specified.

(*d*) For the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to those accomplished by the domestic product when used in substantially the same manner.

(*e*) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

(*f*) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of

articles upon which the President has made a proclamation under the provisions of subdivision (*b*) of this section and for the form of invoice required at time of entry.

(Note that by changing from the foreign market value to the United States value, the increase would be more than 50 per cent, perhaps as much as 200 or 300 per cent.)

Reasons for Granting Writ.

A. The case raises the constitutionality of an act of Congress.

B. It challenges the legality of delegation of the power to tax, which is the power to destroy.

C. That never in our history has the power been given to a delegee, to fix, change, and amend a rate of duty, much less the entire dutiable schedule of a tariff act. This is a power, not only to change the rate, but the classification. Such is purely legislative.

D. (1) That the cost of production cannot be found; (2) That the section bestows upon the President the power to use discretion, opinion, estimation, guess, and judgment; (3) That under the section he cannot find the fact.

E. That this scheme of tariff taxation is revolutionary; destroys the primary constitutional safeguard to liberty and property, which limits to Congress alone the power to fix the amount of a future tax.

F. It provides for a levy, which appears on the face of the statute, for trade advantage to particular citizens and cannot be called a tax laid for the "common defense and general welfare."

G. It is not subject to judicial review because it concerns the purely legislative act of fixing the amount of a future tax.

H. The opinion of the Court of Customs Appeals fails to distinguish the cases cited by it which dealt with interstate commerce, navigation, bankruptcy, health, pure food, immigration, morals, war and countervailing or compensatory-retaliatory duty—reciprocity; the delegation being based on, and being accounted for, by the reason that it was *impracticable to handle the thing in any other way.* Congress has been passing tariff acts since the beginning of our Federal Government.

I. Because the section consolidates the judicial, legislative and administrative.

K. Because the Court of Customs Appeals holds in effect, that fixing the future tax rate is the same as appraisement of a parcel of merchandise from one factory exported on a day certain.

Therefore, it is prayed and respectfully submitted that for these reasons the petition be granted.

WALTER EVANS HAMPTON,
Counsel for J. W. Hampton, Jr., & Co.

NEW YORK, N. Y., *May* 6, 1927.

BRIEF IN SUPPORT OF PETITION.

The opinion of the United States Court of Customs Appeals is found in (R., 77) 14 Ct. Cust. Appls., — T. D. 42030, 51 Treas. Dec. 10, p. 41.

The statute which is relied on is the Tariff Act of September, 1922, Par. 12 (42 Stat., 860), Title I, and Sec. 315, Title III (42 Stat., 358, 941).

I.

In this case we challenge the constitutionality of the so-called Flexible Tariff, as embodied in Section 315, of the Tariff Act of September 21, 1922, as taxation by executive fiat; hitherto unknown in our history and expressly forbidden by the Constitution.

We challenge the alleged standard on which it purports to be based—difference in cost of production at home and abroad—as no standard at all, as incapable of definite ascertainment, the result depending on the will and inclination of the President; as involving executive discretion and judgment at every stage of a complicated, confused and involved process. Consequently the alleged finding under it necessarily becomes a mere discretionary guess—a decision between different results in order to fix the amount of the equalizing tax. That is the exercise of the very essence of the legislative trust, and of the power to fix the tax rate committed by the people to Congress alone.

We note here that in determining the difference in cost of production at home and abroad the President may consider "*any other advantages or disadvantages*

in competition." This is not related to difference in cost of production—has nothing to do with it. Yet it has been cited and presumably used in every proclamation issued by the President.

If a finding can be made on "*any other advantages or disadvantages in competition,*" then no argument is necessary to show the unconstitutionality of this act. Every one admits, and must admit, that an executive finding of a tariff rate based upon the *differences between all advantages and disadvantages in competition,* is purely an act of legislation and, therefore, unconstitutional.

Congress itself admitted it when it amended this very scheme as first proposed, for executive fixing of tariff rates upon the *differences in advantages and disadvantages in competition at home and abroad,* and substituted *differences in cost of production* at home and abroad (Con. Rec., pp. 12188, 12190, Aug. 10, 1922). There was a fight, however, and the radical advocates of this delegation successfully insisted on the absurdity, as embodied in subdivision (*c*) of Sec. 315, that the President should still use "any other advantages or disadvantages in competition" in finding the difference in cost of production at home and abroad (Con. Rec., p. 12190, Aug. 10, 1922).

This Court must declare the section (315) unconstitutional as an illegal delegation, because executive fixing of tariff rates, based on the difference in advantages or disadvantages in competition, is plainly and unmistakably on its face an illegal delegation of legislative power and taxing power, irrespective of the

claimed legality of a finding based on differences in cost of production.

We assert that when the executive fixes the amount of the future tax rate (under and within the limits provided by Sec. 315) he taxes the citizen; he legislates for the people; he exercises the power to destroy. If exercised within those limits no court can review his act; nor stop it because confiscatory; nor examine it to see if it is based upon legally sufficient evidence; nor quash it if flatly contrary to all the evidence, *i. e.*—an arbitrary fiat; or because it ignores the Tariff Commission's finding (as has already come to pass); nor enquire into his motives or good faith in acting or failing to act. It does not involve a justiciable subject matter. The courts can not fix the future tax rates, nor review the discretion which such determination necessarily involves. It is not subject to judicial review, because it consists of the purely legislative act of fixing the amount of a future tax, *i. e.*—the purely political act of levying a new tax.

If Section (315) is constitutional, the express constitutional prohibitions confining the power of legislation, and particularly the power of taxation, to the people's representatives are completely broken down. All lines of demarkation between legislative powers and executive powers are forever removed. Such distinction becomes a mere play on words. Such a holding as made by the court below completely nullifies the language of Section I, of Article 1, and Section 8, of Article 1, of the Constitution. Such a holding authorizes and invites Congress to pass its entire responsibility

over the levy of taxation to an irresponsible bureaucracy which before this act had not yet invaded this field; which, up to this, has never been commissioned to fix the amount of the tax rate; either for customs taxes, income taxes, inheritance taxes, or any other taxes. The principle here involved necessarily affects all taxation as well as customs taxation. If the door of this attempted delegation is opened for one kind of taxation, it is opened for all.

The court below, by its ruling, cheerfully gives blanket authority to Congress to abdicate its entire trust over this power to destroy, by merely declaring a few general principles of taxation; one for customs, another for income tax, another for inheritance tax, etc., leaving the bureaucracy to do the rest.

If the court below is sustained, Congress can commit the ascertainment of the actual rate of every tax the citizen must pay, on income, on inheritance, on customs, on everything, to the choice, judgment, and discretion of executive functionaries.

This is the revolution in the American system of taxation for which this so-called flexible tariff opens the door. From that conclusion there is no escape.

Judge Brown, of the trial court, in his dissenting opinion, points out a number of patent instances, as shown by the Tariff Commission's Reports, of the necessary exercise of judgment and discretion leading to different results in making findings of foreign and domestic cost difference. They have actually decided:

> (1) What area (if not the whole United States) they shall cover to compare with the

competing Canadian section in the production of, say, hard spring wheat, and whether winter wheat shall be included in the investigation; the tariff rate applying to all wheat?

(2) Whether costs of one current year should be compared or an average over a period of years, say three, taken for comparison.

(3) Whether transportation costs of the foreign and domestic articles to a common market place should be included or excluded from costs of production.

(NOTE.—If transportation costs to a common market place can be considered, which shall be chosen as between the differing cost of transporting goods, say to a common market in New York, from producers located in Texas, California, Michigan, and Maine. An attempt at averaging these would necessarily be arbitrary and plainly lie in discretion. No averaging would satisfy the long-haul producer. If there happens to be more than one common market place, the difficulty, uncertainty, and hence the discretion, increases.)

(4) Whether the difference between foreign and domestic costs should be measured between points representing a weighted average cost in the two countries, respectively, or at a point representing a cost at or below which the bulk of the American product is produced.

(5) Whether land in the competitive area investigated to determine an agricultural duty should be taken at its rental value or as for a fair return at interest upon its capital value.

(6) What division of costs shall be apportioned between principal and by-products, shown by Page, to be necessarily arbitrary.

(7) The readjustment *vel non* of actual costs to an estimated production equivalent to a given percentage of plant capacity.

After citing these actual decisions Judge Brown says:

"The result of any attempt to choose any method or rule whatsoever for averaging the costs of many different producers, whether based upon 'a weighted average cost' or upon a 'bulk line production cost' or upon any other so-called scientific method, necessarily becomes a mere discretionary guess, *i. e.*, a question of where we choose to draw the line. The final figure arrived at manifestly must depend upon the particular method of averaging which is selected. A method does not become accurate, and its result becomes certain, by merely giving the process a scientific name. A dream does not become a reality through descriptive terminology. A guess does not become a fact by calling it a finding.

* * * * * * *

"Any generalization from such varying factors, however intelligently and painstakingly arrived at by executive authority, must, in the nature of the case, be largely a matter of individual opinion and judgment. As all the factors which make up the finding are themselves variable and uncertain it is impossible that the generalization from them could attain to greater

certainty or be any more than a rough approximation like the finding of damages, in tort, by a jury."

There is absolutely no governmental necessity for the attempted delegation of customs taxation. Congress, without such attempt at abdicating its functions, has itself fixed the rate of all tariff taxes, and of all other Federal taxes, since the formation of our general Government. The excuse cannot be advanced here, as in delegations under the commerce clause (all of which are subject to judicial review for confiscation or arbitrary action), that the wheels of Government will stop if this congressional abdication of power and responsibility is not permitted. That claim is completely negatived by the rates actually fixed in the dutiable paragraphs of this very act, and all other tariff acts previously passed by Congress, during peace and war, from the beginning.

This is a case of first impression. Section 315, in the breadth and radical scope of its attempted delegation, is totally unlike any legislation heretofore passed by Congress. It is pregnant with dangerous new possibilities, changing the whole future course of our constitutional history. Nothing approaching it, or similar to it, has heretofore been attempted.

This, we submit, demonstrates the importance of this case, and the necessity of a review before this Court, of the far-reaching constitutional question here involved.

Therefore we ask that a writ of certiorari be granted to review the revolutionary holding of the United States Court of Customs Appeals; to the end that we may present to this, our Supreme Court, created for the purpose of defending our Charter of Liberty from all assaults of its enemies, oral argument and brief to show the unconstitutionality of this dangerous and revolutionary attempt to destroy our primary constitutional safeguard to liberty and property, which limits to the Congress alone the power to fix the amount of the future tax rate.

We print as an appendix to this brief conclusive statements from distinguished economists and statesmen; some of them engaged in the actual operation of this law (and there are none to the contrary) showing that the finding which this Section 315 directs, of the alleged difference in cost of production at home and abroad, cannot be made *without the exercise of discretion, choice* and *judgment* in using or discarding different factors, *in deciding between different results.* That is the legislative act of fixing the amount of the future tax rate which the Constitution forbids the Executive to do.

II.

Another and separate question also of first impression, never before litigated, or possible to be litigated, is involved in this case, which, in itself, we submit, requires its review by this Court on certiorari.

Never before, in 135 years, has Congress (as hereby provided in said Section 315), avowedly, *on the face*

of the law itself, undisguised, made a levy frankly for "protection," without respect to, or consideration of "revenue." This we attack as an attempt to tax for a private purpose and not for the "general welfare."

The question is, whether a levy can be made, not ostensibly for revenue, thus placing the motives of Congress beyond judicial inquiry, but frankly and on the face of the statute for a trade advantage to particular citizens (any revenue raised therefrom being merely incidental or accidental) and still be called a *tax* laid for the "common defense and general welfare."

The rate of 4 cents per pound upon barium dioxide, fixed by the Congress itself, in the Act of 1922, is laid in the familiar form used for the purpose of raising revenue (whatever its incidental effect) since the formation of our present Federal Government. The legality of that rate so levied cannot be contested. To permit the courts to take proof of its effect, and inquire into the motives of Congress in levying a duty in that form, would upset the Government and transfer power over legislation and over taxation to the judicial branch. The additional 2 cents per pound, however, is expressly stated in Section 315, as well as by the Executive proclamation fixing its amount and directing its levy: to be levied for the sole purpose of equalizing production costs at home and abroad—a protective formula.

This latter, we say, cannot be constitutionally done, and ask this Court to pass upon this point, now for the first time raised by the form of this legislation,

and to that end to grant our petition for a writ of certiorari.

The designation of this tax as a regulation of commerce does not change its nature, nor screen and protect this plan, nor turn it from an illegal delegation into a valid enactment. That is a name bestowed on it as a mere subterfuge to cover an illegal delegation of the taxing power.

A tax regulating commerce is still a tax and subject to all the limitations governing taxation, including the prohibition against its delegation. It is still (unlike commerce rate regulation) the power to destroy. No court can declare it confiscatory.

Again, a "regulation of commerce" is a polite name to give a purely protective levy. If bad as the latter, such designation, even if true, will not save it. Otherwise, for every tax affecting commerce and so named, the limitations preventing delegation and preventing a levy for private purposes, are completely destroyed—*reductio ad absurdum.*

In further support of the granting of a writ of certiorari, we refer to and rely upon the careful statement of what this flexible tariff really is, and the complete, convincing, and conclusive argument against its constitutionality, contained in the dissenting opinion of Judge George Stewart Brown of the trial court (R., 44 to 74). (G. A. 9116—T. D. 41478, 49 Treas. Dec. 595.)

All of which is respectfully submitted.

WALTER EVANS HAMPTON,
Counsel for J. W. Hampton, Jr., & Co.

NEW YORK, N. Y., *May* 6, 1927.

APPENDIX.

A.

Thomas Walker Page, sometimes Chairman of the Tariff Commission, and later Chairman of the Council, Institute of Commerce, Carnegie Corporation of New York, in his book entitled "Making the Tariff in the United States" (Chapter IV, pp. 83-99), says:

> "*The application of the difference between costs as a measure of duties is usually impossible owing to the difficulty of finding what the difference amounts to.* There is much misunderstanding as to what cost accounting can really show. It is true that no manager of any considerable and well-conducted business today fails to record the costs of the business and to make some analysis of them. He finds it desirable to do so in order to stop leaks, to promote efficiency, to exhibit the net profits of the enterprise, and for other purposes. There is a popular assumption that the records thus kept will accurately disclose the cost per unit of the products turned out. In fact, however, this is seldom the case.
>
> "A multitude of questions arise in regard to the items which should be allowed as component elements of cost, and to these the answers are different in different plants and also for different purposes. Shall the owner's salary, for instance, be considered a part of the cost of production; and if so shall he be allowed a salary at an arbitrary rate or shall the particular amount be allowed which he sees fit to claim? Shall the materials used be valued at their market price,

or at what it actually cost to procure them? Shall interest be allowed on the value of plant and equipment; and if so is it proper to take the value of the plant as a 'going concern,' or is it better to take as the value for estimating cost the outlay of the owners in acquiring and improving it? Such questions suggest that cost can be made to seem either high or low by the system of accounting which is followed. It might be possible in time to standardize the system and thus in a somewhat arbitrary way to reach a cost per unit of product in some industries that consist of simple and independent processes resulting in a single product. But such industries are relatively few. Modern industrial processes are commonly so organized and integrated that they contribute jointly to the completion of a number of different commodities. The accountant is usually faced, therefore, with the problem of joint costs, and the solutions accepted are *purely arbitrary* and differ widely from one plant to another.

"Even in a simple pastoral industry, such as sheep husbandry, this problem is encountered. It may be noted in passing that this industry also presents a number of other problems, which arise in determining what are to be accepted as elements of costs. Should rent on the land used and interest on the total investment be regarded as items of cost, and, if so, at what rate? On the other hand, should account be taken of certain indirect but valuable considerations, such as the destruction of weeds or the improvement of the soil; and if so, how can their value be appraised? But aside for any question as to how the total cost is constituted,

what is the *basis* on which it can be divided between the wool and the meat produced? The existing tariff law imposes duties at different rates on sheep, on mutton, on lamb, and on several varieties of wool. If these duties are to be measured by the difference between domestic and foreign costs, the total costs of sheep husbandry must in some way be distributed amongst the different products on which the duties are levied.

"The basis of distribution adopted by the Tariff Commission is doubtless as good as any. Thus the Commission reported that in Montana during 1919 the expenses for 82,122 sheep were $9.93 a head. This was made up of labor, interest at 6 per cent on investment, feed, fees and rentals, shearing, depreciation and miscellaneous. It is clear that no important item except shearing was incurred exclusively for a single product. Expenditures for labor, feed, and the rest were made for producing both meat and wool. The Commission divided the joint costs between these two products in proportion to the sheep owners' receipts from each of them. In that year it happened that 61 per cent of the total receipts in Montana came from wool and 39 per cent from mutton and lambs. As the average amount of wool sheared was slightly over eight pounds per head, this method of division showed the cost of wool in Montana to be more than 76 cents a pound. In the other range states it varied that year between 32 cents in Texas and about 49 cents in Idaho.

"The fallacy of the method is obvious, since it makes it appear that the smaller the receipts from either product the lower will its cost be.

This is clearly contrary to fact. Thus a hard winter, with feed scarce and dear, followed by bad weather during the lambing season, compels the flock owner to make unusual outlays to save any lambs at all. In spite of his efforts the lamb crop is apt to be poor and the lambs stunted and unable to make satisfactory development, so that his receipts from them are small. Under such circumstances the commission's system of accounting would show that the cost of the lambs was exceptionally low and that of wool proportionately high; and by a pernicious paradox if the lamb crop were a total failure, the lambs would have cost nothing at all! Conversely, conditions favorable to a good lamb crop would appear to raise the cost of lambs and thereby lower the cost of wool. It should be noted, however, that receipts vary not only with conditions of production but also with changes in the market, and the price received for lambs is determined by causes quite remote from those that determine the price of wool. Thus a rise for any reason in the price of wool would appear, regardless of the actual outlays incurred, to lower the cost of growing lambs.

"And yet, defective as the Tariff Commission's method of allocating costs may be, there is none that is better. *The truth is that there is no separate cost of producing wool.* There is a cost of growing sheep and for a defined locality year by year it may be found and recorded, but any distribution of the cost among the products of the business is altogether arbitrary. To the sheep owner this is a matter of little moment. He is not much concerned with

how much of the cost is to be allocated to wool and how much to lambs. *But to the tariff maker it is a matter of vital importance* if he is to put one duty on sheep and other duties on wool, mutton, and lamb, and if he must measure the duties by the difference between the domestic and foreign cost of producing these several things.

"The difficulty found in trying to establish the cost of producing wool is much greater when it comes to finding the cost of commodities, such as cattle hides, which are the by-product rather than the joint product of an industry. Agriculture presents many similar instances. *How can the cost of raising cotton seed,* for example, on which there is a duty of one-third of a cent a pound, *be segregated from the cost of raising cotton,* on which there is no duty at all? Flaxseed in some countries is a by-product of growing flax; in other countries flax is cultivated for the seed alone. *How is a comparison of costs to be made in such a case?* Straw is a relatively unimportant by-product of wheat, oats, barley, or rye. *On what theory can an independent cost be assigned to it?* Some varieties of hay are grown chiefly as a cover crop, others for their effect on the soil, and there is *no reasonable hypothesis* on which a *specific cost of production can be imputed to them.* Yet all these things are now dutiable.

"In many branches of manufacturing the problem of joint costs is even more confusing than in agriculture. In its study of the dye industry in 1919 the Tariff Commission found that different producers used five separate

bases for distributing expenses, namely, the amount of labor directly used on a given product, the cost of the raw material going into it, the amount of superintendence chargeable to it, the sales value of the product, and the capital investment imputed to it. Naturally the costs showed great diversity, and the commission on presenting its report found it necessary to 'strongly emphasize the uncertainty of conclusions drawn from the cost figures in this report, and the possibility of error in administrative action based upon such data. * * * The figures are, however, the most trustworthy and the most significant that can be immediately procured under present conditions in the industry, and in any discussion of the cost of production the tables must be accepted as the nearest approach to accuracy now possible.' It is true that the dye industry furnishes an extreme illustration of the difficulties involved in cost finding. But after all it is only a question of degree, and *the Tariff Commission's frank statement might well be extended to every industry resulting in a variety of products. 'The nearest approach to accuracy possible' must always leave room for 'uncertainty of conclusions drawn from the cost figures and the possibility of error in administrative action based on such data.'* Obviously, the uncertainty of cost data severely contracts the field in which the difference between foreign and domestic costs can be used to measure duties.

"Even if cost data were reliable the fact would remain that there is in every country more than one cost at which any commodity is produced in commercial quantities. From this

it follows that there is no such thing as a single domestic cost or a single foreign cost of production for any commodity. A report of the Federal Trade Commission in 1920 showed that in Oklahoma and Texas the cost of preparing a three-year-old steer for market varied on different ranches between $68.20 and $101.67. Even before the war the cost of making beet sugar in the United States differed at the factories all the way from $66.40 to $139.80 a ton. The cost per pound of growing wool (including interest on the investment) as estimated by the Tariff Commission for the range states in 1919 was 32 cents in Texas, 41 in California, 43 in Colorado, 49 in Idaho, 76 in Montana, 36 in Utah, 35 in Washington, and 48 in Wyoming.

"The process of manufacturing the pigment known as lithophone is comparatively simple. In 1919 it was carried on in the United States by eleven companies, who, taken together, produced 145,000,000 pounds. Their methods of accounting were detailed and fairly comparable though there was lack of uniformity in treating individual items, and the Tariff Commission found little difficulty in ascertaining costs for each company in the industry. One company was producing lithophone at 5.29 cents a pound. From this figure the cost rose quite gradually for other companies to a high point of 7.51 cents a pound. A subsequent investigation two years later showed costs ranging between 5.58 and 7.73 cents a pound, a variation equal to 38 per cent of the low cost. In more complicated and widely distributed industries costs when found usually show a far greater variation.

"Causes for this variation are numerous. It often happens that the same product is obtained from materials so widely different that the processes of manipulating them are utterly unlike. Thus potash in 1919 was obtained in the United States from natural brines, molasses, silicate rocks, kelp, wood ashes, the dust of cement mills, and other sources. Sometimes different methods are applied to the same materials. Ferromanganese, for example, made in blast furnaces in the United States was estimated to have an average cost of $159.67 a ton in 1919. It was being made at the same time in electric furnaces at an estimated average cost of $218.94 a ton. Similar differences were observed in the case of other ferro alloys.

"Very often costs vary because of unequal climatic conditions, qualities of soil, advantages of location, or availability of fuel or water power. Quite obviously they are strongly affected by the efficiency of management, which differs widely from plant to plant. Sometimes also the variation is caused by what appears to be a mere element of chance. Two cloth manufacturers, for example, may be equally well situated and equally efficient, using the same materials and practically the same processes so that their products show no appreciable difference in texture or quality. Yet the fabrics turned out by one of them happen to please the public fancy by reason of some peculiarity of color or design, and the mill producing them runs throughout the season at full capacity. The fabrics of the other fail to meet the whim of prevailing fashion; orders for them are small and the mill's output is correspondingly

reduced. At the end of the season the costs per mill might approach equality, but the cost per yard of these similar fabrics would show a wide divergence. In 1918 the western half of the cotton belt was visited by a severe drought which so damaged the crop that on many plantations the actual cost of the cotton picked was more than $1.00 a pound. In the Eastern States, on the contrary, the season was favorable, and the cost of much of the cotton picked was less than 20 cents a pound. *These illustrations suffice to show that variation in costs of production is general, that it can not be compensated by any method of bookkeeping, and that it can not be prevented by any device of human ingenuity.*

"*There is, in fact, no such thing as a single 'domestic cost of production' for any commodity.* There are almost as many different costs as there are producers; and the question arises: which should be taken for comparison with a foreign cost to find a standard for measuring duties? It is obvious that the higher the figure taken the greater will be the proportion of the industry protected. But no one would advocate duties high enough to protect producers whose high costs are due to unwise location, inadequate equipment, extravagant methods, or poor management. On the other hand, if the lowest cost be taken it might well result in no duty at all, for the lowest domestic costs are sometimes less than are the lowest costs abroad.

"Perhaps the advocates of this method of tariff making most commonly have in mind a comparison of the *average* domestic cost with the *average* foreign cost. Now the average

might mean either the average cost per unit of the commodity under consideration, or the average cost in the different plants producing it, or the cost that is just midway between the highest and the lowest in the industry. *These three figures would never coincide except by accident, and none of them would precisely meet the purpose in mind.* Consider by way of illustration the operation of averages in the industries already mentioned: The Tariff Commission estimated the average cost per pound of producing raw wool in the range states in 1919 to be 45 cents. A representative of the commission who visited Argentina estimated the average cost in that country at the same time to be 27⅓ cents. The difference then was 17⅔ cents. But a duty at this rate on unscoured wool would be 12 cents a pound higher than was shown to be needed in Texas, and higher than was necessary in five other range states, while it would fall short by 50 cents a pound of protecting sheep raisers in Montana and by less amounts in Arizona, Idaho, and Wyoming.

"For lithophone the Tariff Commission gave the average cost not by pounds produced but by companies producing it. This average during the first six months of 1921 was 6¼ cents. For half the number of producers the cost was less than this and for half it was more. There is nothing to show what part of the total output was produced above or below the average cost of the different companies. But whatever the average cost per pound may have been, it is clear that a duty based on the average cost of the separate producers would have given unnecessary protection to some of them and would

have left others unequally exposed to foreign competition.

"Again, the domestic beet-sugar factories of the United States in 1918 showed an average cost of $130.61 per ton. But the factories producing at a lower cost than this had a greater output than those where the cost was higher, so that the average cost of the beet sugar they all produced was only $109.96 a ton. In that year the average cost by tonnage in Cuba was $78.72. A duty then of $31.24 a ton—or say, roughly, $1.57 cents a pound—would have equalized the difference in costs for half the beet sugar produced in the United States, but for substantially less than half the producers. Now it happens that the highest costs are found in the eastern region of production, that is, Michigan, Ohio, Wisconsin, Indiana, Illinois, Minnesota, and Iowa. A duty, therefore, high enough to protect only the average would have sufficed for the mountain states, would have more than sufficed for the Pacific Coast, but would probably have put out of business most of the eastern beet-sugar factories as well as the cane growers of Louisiana.

"It is hardly to be expected then that a committee of Congress framing a protective tariff will accept as 'the difference between foreign and domestic costs' a mere difference of averages and base upon it duties that it believes would fail to protect wool growers in such important centers of the industry as Montana and Wyoming or beet-sugar producers in a region of such great political power as Michigan, Ohio, and the adjoining states.

"It is well to remember, furthermore, that in most industries costs vary from time to time as widely as they vary from plant to plant. Wool, for example, which was estimated to cost 76 cents a pound to produce in Montana in 1919 had been produced for less than 44 cents in that state the year before. *To establish a reasonable average cost, therefore, would require an investigation of protected industries, not for one year only but for a number of years. This would render the proposed method of tariff making impossible until after the lapse of at least half a decade and the expenditure of many millions of dollars.*

"*The difficulties of obtaining and verifying costs of production are infinitely greater in foreign countries than they are in the United States.* Any investigation of foreign costs would not only encounter in exaggerated form the difficulties found in the study of domestic costs, but would also meet others that are even more serious. *With rare exceptions the ascertainment of such costs with any degree of accuracy is wholly impossible by an agency of the American government.*

"In its inquiries at home the Tariff Commission is empowered by law to compel any person, firm, or corporation to produce its books or papers and to give all pertinent information under oath in regard to the subject under investigation. The commission has no such power abroad. It must depend upon published materials, the general observations of its agents, and such information as foreign producers may be willing to give. But it is quite inconceivable that the manufacturers of any country would

tolerate a detailed investigation of their business by the agents of a foreign government which proposes to use the results as a ground for strengthening the position of its own citizens. Trade secrets, as a rule, are more jealously guarded abroad than in the United States. Foreign manufacturers are more dependent than Americans have been on export markets, and fierce competition in international trade has made them secretive in regard to processes, costs, prices, and business connections. They would raise every possible obstacle to the disclosure of the intimate details of their business to men who, though they might be under pledge as government agents at the time, yet may become the employees of their overseas competitors in the near future.

"The difficulty of foreign investigation is indicated by the following question put to Professor Jastrow to agents of the Tariff Commission at a meeting arranged for them with German manufacturers in 1921.

" 'It is suggested that German production costs should be ascertained in order to base American tariff rates thereon. I have followed during the last twenty or thirty years the efforts of the German manufacturer to determine accurately the cost of production of the articles he manufactures, and I have failed to find that any one of them has as yet discovered a method by which he could exactly establish his production costs. *As we in Germany do not know our costs of production what reason has the United States for hoping to determine our cost of production which we do not know ourselves?* I

should like to know something about the methods which the United States may employ to be able to bring this about.'

"This is testimony on competent authority to the impossibility of finding out with accuracy even domestic costs. Of significance also were articles in the German press during this visit of the commission's agents commenting on the suspicion evident among German manufacturers that the information sought might be placed at the disposal of American manufacturers and that the activities of the agents were in the nature of commercial spying. The Secretary of the National Association of German Industries told the agents that the objection of German manufacturers to giving them information was due in large measure to the nature of the questions asked. They considered such matters as construction, speed, the nature and use of machinery, and the like to be trade secrets and felt that they were under no obligations to disclose them to foreigners. Several manufacturers did indeed furnish reports to the commission's agents, but no opportunity was granted to check them by an examination of books or personal inspection of plants. The reports threw considerable light on the state of German industry, but they were quite general in character, and as was to be expected they included in the main such facts only as would show that high American duties were not necessary.

"Indicative of the attitude of French manufacturers is a report of the American Consul at Marseilles under date of November 15, 1922.

"At a meeting held by French manufacturers on this subject at Paris on October 21, 1922, the

principal speaker took the attitude that production costs can not well be set forth by French manufacturers. He said:

" 'There can be no question of hunting out or revealing their costs of production. *The diversity of conditions within any industry is such that investigations of this kind could not give results of practical utility'* * * *

"The meeting * * * agreed with the foregoing attitude and decided to collect information showing merely the proportions in which production has become more expensive in France since before the war. Even these data, which can aid the Tariff Commission very little in seeking to render Section 315 operative, are to be revised and interpreted by the French Minister of Commerce before they are made available. * * * They have always resented investigations by American agents into their costs of production; and it is very doubtful whether such investigations, if made without their genuine co-operation, will yield results conforming to the necessities of the Tariff Commission under the rigid terms of the act. It is to be recognized that there is some reason in their argument that it is impossible to establish any staple average for production costs in many industries.

"A letter of December 4, 1922, to the Tariff Commission from its agent in France says:

"They are opposed to and will undoubtedly obstruct as much as possible any investigations which the commission may desire to make in France. They have informed me that the French government itself has never been able to pass even a census law which would go beyond verifying the number of establishments and

workers therein, and that even for fiscal purposes French officials had difficulties in getting at the books of manufacturers and merchants. That it would, therefore, establish a very dangerous precedent to grant the right to a foreign official to verify costs of production in France. * * * However, to facilitate the work of the Tariff Commission the Government and the National Association would endeavor to supply the commission with all information of a general character, so that it would be spared the trouble of making a research for statistics distributed throughout numerous publications."

B.

Thomas O. Marvin, present Chairman of the Tariff Commission, at page 26 of the Commission's Report on Wheat and Wheat Products, says, among other things:

> "* * * the experts of the commission were compelled to prepare an *estimated* or *theoretical cost* based upon a system of allocating a percentage of milling costs in the proportion which *receipts* for mill feed bore to *receipts* for flour."

C.

F. W. Taussig, of Harvard, another former Chairman of the Tariff Commission, in his address on December 9, 1925, before the American Economic Association, published in the Congressional Record of January 4, 1926, page 1051, says:

> "The point which is important for my present argument is that any decision which is finally reached—any figure which purports to state the differences in cost—necessarily involves the exercise of judgment. No exact and certain conclusion can be reached even by the most perfectly conducted investigation. There is always the possibility of choice between different results, according as you select one or another method of averaging, cover one or another period of time, put your marginal produce or your bulk line at a higher or lower point, consider this figure or that to be the representative one. Even the most competent and impartial tariff commissioner will often have to confess that there is no one figure which can be unqualifiedly said to be the accurate one."

D.

Philip G. Wright, in the *Review of Reviews* for November, 1922, page 502, says:

> "In many cases the collection of costs is impossible for the simple reason that they do not exist. What, for example, is the cost of producing wool as distinguished from mutton, of hides as distinguished from beef, of gasoline as distinguished from kerosene, lubricating oil, and a dozen other petroleum products? Where costs can be ascertained it is found that no two manufacturers manufacture at the same cost, and the problem of selection arises. Shall it be the highest or lowest, the average or marginal that is to be used for determining the duty? Wages and prices of materials are extremely uncertain guides. In the case of 29 sugar centrals in Cuba, all having the same opportunities for obtaining labor and materials, the highest unit cost was more than twice the lowest, with the costs for the other 27 ranging in gradation between."

E.

President Coolidge, when (after consulting other departments and after pointing out how conditions may change during the progress of an investigation) in making his "findings" declining to follow the Tariff Commission's recommendation upon Sugar, describes this process as one involving choice or discretion in the following words (Sugar Report, July 31, 1924, pp. 216, 217):

> "It is obvious from the reports that there is a wide variety of conclusions which can be obtained, peculiar in this industry, by alternative methods of interpretation of the same basic data. This appears to me to be fundamentally due to the wide fluctuations in the cost of production in different years and in different parts of the industry for which averages have been taken. These variations have been as much as 200 per cent, and in itself seems to indicate that a longer period of more stable conditions is desirable before conclusions. For instance, in arriving at a conclusion from the data in hand it is possible to base interpretations either upon the six-year period which embraces in its first four years a time of great distortion of costs due to inflation and deflation, or it is possible to base conclusions upon either two or three most recent years. It is also possible to arrive at different conclusions based on whether we compare costs of different regions during the time of production or during the time of marketing of the products. It is also possible to vary conclusions by the different methods of interpretation involved in advantages and disadvantages in competition. Furthermore, as the beet-sugar in-

dustry is the one for which we must have utmost solicitude, it is possible to vary conclusions by the adoption of that industry as the standard or by the inclusion of all other forms of domestic and insular production, and to still further vary them by adoption of the costs of the beet industry in particular States."

F.

The Honorable Chief Justice of this Court, when President of the United States, said:

> "The difficulty in fixing the proper tariff rates in accord with the principle stated in the Republican platform is in securing reliable evidence as to the difference between the cost of production at home and the cost of production abroad. The bias of the manufacturer seeking protection and of the importer opposing it weakens the weight of their testimony. Moreover, when we understand that the cost of production differs in one country abroad from that in another, and that it changes from year to year and from month to month, we must realize that the precise difference in cost of production sought for is not capable of definite ascertainment, and that all that even the most scientific person can do in his investigation is, after consideration of many facts which he learns, to exercise his best judgment in reaching a conclusion."
>
> (Copied from Journal of Commerce & Commercial Bulletin, August 20, 1910, and August 29, 1910; also from a public letter, dated Beverly, Mass., August 20, 1910, to Mr. McKinley, Chairman of the National Congressional Republican Committee.)

G.

United States Tariff Commission's Report on Wheat and Wheat Products, March 4, 1924 (p. 26); statement by Thomas O. Marvin:

> "In consequence, the experts of the commission were compelled to prepare an estimated or theoretical cost based upon a system of allocating a percentage of milling costs in the proportion which receipts for mill feed bore to receipts for flour. As the business is actually conducted, mills merely credit or deduct feed at the current price from their total costs; the higher the price of feed the lower can they quote for flour. According to the testimony of millers, $1 per ton upon mill feed amounts to about 3½ cents per barrel of flour."

II.

(P. 28:)

> "The applications of the data which, in our judgment, warrant and require the foregoing determinations will now be stated.
>
> "With respect to the data on wheat the following alternatives present themselves:
>
> "1. Shall the costs for the year 1923 be applied or shall the average of the costs for the years 1921-23 be applied?
>
> "2. Shall the difference between American and Canadian costs be measured between points representing a weighted average cost in the two countries respectively, or at a point representing a cost at or below which the bulk of the American product is produced?

"3. Shall account be taken of differences in costs of transportation from the points of production to some assumed common market in the United States?"

III.

"It seems clear to us (1) that 1923 costs should be applied; (2) that the difference should be measured at a point covering the bulk of American production; and (3) that transportation costs should not be taken into account."

(Pp. 31, 32:)

"No one statistical device can be accepted as controlling, the effect of which is to enable the domestic demand for the product to be supplied at a price level which would eliminate a large proportion of American producers.

"Any assumption that the weighted average cost is preferable because it would permit a determination of cost differences with greater mathematical precision is a mistaken assumption. The data collected in this investigation are not the costs of all the hard spring wheat producers in the United States and in Canada. They are the costs of a limited number of representative producers in certain representative areas. Any automatic weighted average of the entire hard wheat production in each country is therefore out of the question. In any event, the conclusion rests upon premises arrived at as a result of a process of representation. Nor is this all. The very object of this investigation is the ascertainment of representative costs. No cost can be representative which does not reflect cost of the bulk of production.

If any statistical method or process is not fitted for the ascertainment of a unit cost of the bulk of the domestic product, it is to that extent defective and inapplicable. To adhere to it upon the assumption that it has greater mathematical precision involves an implication of certitude which is delusive."

(P. 38:)

"But not only would an investigation confined to the costs of the 1923 crop (assuming that it could be completed by March, 1924), prove futile for the present emergency; it would be equally useless for determining what, if any, duty is normally required to equalize the differences between foreign and domestic costs. For that purpose, the investigation, as in other cases, must cover a period sufficient to indicate the *advantages and disadvantages* in competition which the duty is assumed to measure and equalize. Thus a hurried investigation would be neither an immediate remedy for the present crisis nor an effective application of the statute in general."

(P. 40:)

"The chief witness who testified in the commission's public hearings with reference to the application of the bulk line was Prof. R. E. Willard, a farm economist of the North Dakota Agricultural College, who appeared in behalf of a committee of farmers, bankers, and business men of North Dakota. Professor Willard said in part (stenographers' minutes, United States Tariff Commission, February 18, 1924, pp. 332-335):

'The question of the bulk line is a rather theoretical and sometimes vague proposition. Bulk line is usually determined in the range of costs at a point where it is supposed that if the price were placed at that point, it will maintain a certain standard or a certain quantity of production. In other words, in all lines of production there are those who are on the upper extreme in costs and those who are on the lower extreme. The bulk of the commodity that is required for consumption is the object sought for, and if there is too much production the bulk-line point may be lowered in order that the greater number may be in the high-cost class, while if there is too little, the price may be established at a point to increase production, and therefore the point would be raised in the scale of costs, and there would therefore be a less number producing at a loss than in the other case. Whether the same bulk-line point should be established in Canada as in the United States, if we were to consider the two propositions, is a matter, it seems to me, that the commission would have to determine, based upon the desired result. If it is desired to increase production in the United States, the bulk line would be placed low in the scale. * * * It is just the reverse. It would be placed in the scale so that there would be a less number producing at a loss. * * *'''

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 1115

J. W. HAMPTON, JR., & CO., PETITIONER,

vs.

THE UNITED STATES.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

As stated in the original petition (p. 2), the Department of Justice filed a certificate with the United States Court of Customs Appeals (R., 76), in which the Attorney General certified that, in his opinion, the case is of such importance as to render expedient its review by this Court.

Under the express terms of Section 195 of the Judicial Code, certiorari may be granted when a constitutional question is in issue in a customs case *without certificate of importance being filed.*

Being advised and surprised that there is a probability of the Department of Justice opposing the petition, notwithstanding it agreed to, and did file the certificate, it is deemed necessary to refer to Field *vs.* Clark, 143 U. S., 649 (R., 83), and other cases cited in the opinion below.

In the petition and brief we treated the subject in a condensed and general manner. We mentioned principles only. As there may not be sufficient time to reply, it is thought necessary to anticipate.

At page 10 of the petition ("H") we condensed (1) the merits; (2) the reasons of and for the decisions cited by the court below. The Field case, whilst a tax case, principally involved and was based on the question of *reciprocity*, necessarily comprehended compensatory-retaliatory acts. Reciprocity and retaliation is speaking for each other.

The Field case is the only tax case cited in the opinion below in which the question here at issue, *i. e.*, the legality of the delegation of the power to tax, was raised in brief or argument, or discussed in the opinions of this Court.

In the Field case four tax rates were named in the act itself. The President did not calculate, estimate, speculate or guess at their amount, or use an indefinite formula, as he does here, such as "*any other advantages or disadvantages in competition.*"

In the Field case the President was given power to put the statutory rate into effect against such countries as to which he found (as a fact) discriminated against our export trade by their laws. That was a

very simple finding, based upon a certainly ascertainable fact, concerning which no two intelligent minds could possibly differ. This, the majority of the Supreme Court held, involved no discretion to make the law on the President's part.

The plain inference from Mr. Justice Harlan's opinion is that, had he found (as the dissenting justices claimed) that the reciprocity provision involved executive discretion and judgment, choice between different results (as does the flexible tariff), h vould have held the act unconstitutional.

No one can reasonably contend that using "any other advantages or disadvantages in competition," in order to evolve a tariff rate, is merely finding a "fact" on which a statute can be made to take effect or depend. Nothing indefinite like that was in the reciprocity law sustained in Field *vs.* Clark.

Difference in cost of production is no standard, because it involves choices between different results at every stage, but "any other advantages or disadvantages in competition" is no standard on its face. There is nothing definite or certain about the expression. Yet it is there in the act, and it cannot be ignored. Its presence makes Section 315 unconstitutional, irrespective of the unconstitutionality of the "difference in cost of production" formula.

Under the flexible tariff the President fixes the rate of a future tax, as a result of estimating costs in individual factories or farms, first chosen as representative, and after arbitrarily (there is no other way) separating costs of joint or by-products; then, after choosing between a weighted average cost, or a bulk-line

cost or some other method, and then applying the chosen method of averaging at the desired point, and then averaging the cost of transportation to a common market; and, after having chosen whether the investigation shall cover one year or five years, with changing conditions, then comparing these with foreign costs arrived at in the same uncertain and indefinite way; on top of all this, using "any other advantages or disadvantages in competition" as a mysterious further method of finding differences in cost of production.

Discretion, choice between different results, decision and judgment, is experienced at every stage of this process.

To compare such an elaborate exercise of the mind with the simple process of looking into a book (see Solicitor General's statement in note below), as in the Field case, in order to detect foreign discrimination against our export trade is impossible. The two processes are intrinsically and fundamentally different. There is no comparison. To make such a comparison is as legally absurd as to liken the flexible tariff to the *ad valorem* appraisement of merchandise.

The latter claimed analogy is tantamount to saying that there is no difference between fixing the rate of a future tax for all importations and applying an existing rate to a particular shipment on a day certain from a particular foreign factory. Or that an act of new legislation is the same thing as a legal contest over the application of an existing law to a particular importation.

There is no substantial dispute in this case that the action of fixing a tariff rate under Section 315 is legis-

lation. The comparison is between the action of the President in merely finding a simple fact of discrimination against our export trade, upon which the rate already named takes effect, as in Field *vs.* Clark, or conjecturing differences in cost of production while considering *"any other advantages or disadvantages in competition,"* from which complicated action (above described) a new rate of taxation emerges.

The former this Court held in the Field case could be legally done. For the latter (Section 315) there is no legal precedent or authority. No case has sustained any tax statute remotely resembling it.

It is this new adventure in law making, this new experiment in the delegation of the taxing power to the Executive, which we ask this Court to review by certiorari, for this in effect, is the result of the decision below.

The countervailing duty cases, Downes *vs.* U. S., 187 U. S., 496, and Nicholas *vs.* U. S., 249 U. S., 34, and the currency cases, such as Cramer *vs.* Arthur, 102 U. S., 615, are not in point, because in them no question was raised of delegating legislative power or taxing power; and of course no such question was discussed by this Court in the opinions.

The Court of Customs Appeals' opinion deals with unrelated matter, standing on a different footing, principally justiciable controversies over carrier rate making or regulation and similar justiciable questions. This case involves the delegation of the power to fix the future tax rate.

The tax levying power stands in a class by itself, because, being the exercise of the power to destroy, the

Executive action under the flexible tariff is not subject to judicial review for confiscatory or arbitrary action or unreasonableness, or to review the discretion imposed in fixing a new tax rate within the limits prescribed by the section.

(NOTE.)—The Solicitor General (now Mr. Chief Justice Taft) said in the Field case, 143 U. S., 649, No. 1052, October Term, 1891, in brief for the United States, page 87:

> "If the tariffs of the foreign countries are reciprocally reasonable and equal toward the productions of the United States or are made so, then their sugar, hides, coffee, and tea are to come in free; if the foreign tariffs are not so reciprocally equal and reasonable, then certain duties are to be imposed on the four articles from those countries. The President is required to determine whether the foreign tariffs are reciprocally equal and reasonable to merchandise of the United States or not, and when he determines that they are not, he must proclaim the fact, and the free list is suspended and duties are imposed."

Compare this with (Section 315) changing the whole dutiable schedule within a range of 100 per cent, from the highest changed rate to the lowest changed rate, and even more if American selling price is used.

All of which is respectfully submitted.

WALTER EVANS HAMPTON,
Counsel for J. W. Hampton, Jr., & Company.

NEW YORK, N. Y., *May* 26, 1927.

Office Supreme Court, U.S.
FILED
SEP 17 1927
CHARLES ELMORE CROPLEY
CLERK

No. 243

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

J. W. HAMPTON, JR., & CO., PETITIONER,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

MOTION TO ADVANCE.

PRESS OF VREDENBURGH PAYNE, NEW YORK CITY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 242.

J. W. HAMPTON, JR., & CO., PETITIONER,

v.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

Motion to Advance.

Comes the above named petitioner and moves to advance this case for early argument on a date convenient to the court, and for cause says:

The question presented here is whether Section 315, of the Tariff Act of 1922 (42 Stat., 358, 941), is constitutional. This is the so-called Flexible Tariff Provision.

It involves an important constitutional question, affecting in its ultimate results, not only the entire business of manufacturing and importing merchandise, but the future policy and legal practice of the Federal Government in the levy of every kind of Federal taxation; thus affecting, as well, the whole people of the United States.

At no time since the creation of our Federal Government has such a novel innovation in taxation been advanced. This is a case of first impression, involving a totally new question, which, it is respectfully submitted, should be speedily decided.

As in duty, etc.,

WALTER EVANS HAMPTON,
Counsel for Petitioner.

New York, N. Y.
September 14, 1927.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927.

No. 242.

J. W. HAMPTON, JR., & CO., PETITIONER,

v.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

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THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS APPEALS.

The opinions below are reported as follows:

United States Court of Customs Appeals, 14 Ct. Cust. Appls., 350; United States Customs Court, 49 Treas. Dec., 593, T. D. 41478 (R., 11; Dissent, R., 42).

For jurisdiction, petitioner relies on:

Writ of Certiorari, granted June 6, 1927 (R., 106); Sec. 195 (36 Stat., 1145), of the Judicial Code, as amended August 22, 1914, C. 267 (38 Stat., 703), as amended September 6, 1916, Sec. 6 (39 Stat., 726, 727).

Judgment to be reviewed is dated February 24, 1927 (R., 105); Mandate March 26, 1927 (R., 105).

Statement.

This case raises the question of the constitutionality of the so-called flexible tariff provision (Section 315, Tariff Act of 1922 (42 Stat., 358, 941). There is a monetary in-

terest involved to recover duty paid to the collector of customs, New York, who assessed, by virtue of a proclamation of the President (R., 14), 45 Treas. Dec., 669. T. D. 40216, Barium Dioxide, at 6 cents per pound; instead of the statutory rate of 4 cents per pound, paragraph 12, 42 Stat., 860.

Protests and appeal were made (R., 7, 8), as provided by section 514, part III, Title IV, 42 Stat., 969, and the case came on for trial before the Board of United States General Appraisers—since denominated the United States Customs Court (44 Stat., 669, C. 411, sections 1, 2,—Part I; 49 Treas. Dec., 943, T. D. 41616). The United States Customs Court was divided (majority op's r. 11; dissent r. 42). Thereafter, on appeal to the United States Court of Customs Appeals, the lower court was affirmed (R., 105).

Summary.

The question is one of law. The protest lodged with the Collector of Customs at New York (R., 7, 8) is as follows:

> "We hereby protest against your decision assessing duty at the rate of six (6) cents per pound, or other rate or rates, on certain merchandise known and assessed as Barium Dioxide, or Barium Peroxide, and or other merchandise, covered by entries below mentioned.
>
> We claim that the merchandise is properly dutiable at four (4) cents per pound, under paragraph 12, of the Tariff Act of September 21, 1922.
>
> We further claim that if the assessment and liquidation of duty is purposed to be made by authority of the President under section 315, etc., Title III, of said act, it is unconstitutional and void; that the President's proclamation dated May 19, 1924, T. D. 40216, is unconstitutional and void:

(1) Because it is done under and by virtue of an illegal delegation to the Executive Department of the power to legislate, which power, by the Federal Constitution, is solely committed to Congress.

ARTICLE I.

'SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.'

(2) Because it is done under an illegal delegation to the Executive Department of the power to tax, which power is alone lodged in the Congress of the United States by 'Section 8'. 'The Congress shall have power to lay and collect taxes, duties, imposts and excises, * * *."

(3) Even if in form it has been done by constitutional delegation of legislative power and of the taxing power it purports on its face to make a levy, not for raising public revenue, but under a declared policy for protection to American industries, based upon difference of cost of production at home and abroad, which is not a tax or duty within the meaning of the Federal Constitution.

We further claim that your action and decision, the acts of the Tariff Commission, and the act of the President of the United States, are singly, and collectively, null and void, being unconstitutional; that is to say, being contrary to the express provisions of the Federal Constitution and the specific grants of power bestowed only and contained in said Constitution."

The case raises the following questions:

A. The constitutionality of an act of Congress.
B. It challenges the legality of delegation of the power to tax, which is the power to destroy.

C. That never before in our history has the power been given to a delegee, to fix, change, and amend a rate of duty, much less the entire dutiable schedule of a tariff act. This is a power, not only to change the rate, but the classification. Such is purely legislative.

D. (1) That the difference in cost of production at home and abroad cannot be accurately found; (2) That the section bestows upon the President the power to use discretion, opinion, estimation, guess, and judgment; (3) That under the section he cannot find the fact, without using legislative discretion.

E. That this scheme of tariff taxation is revolutionary; destroys the primary constitutional safeguard to liberty and property, which limits to Congress alone the power to fix the amount of a future tax.

F. It provides for a levy, which appears on the face of the statute, for trade advantage to particular citizens and cannot be called a tax laid for the "common defense and general welfare", because it is not for the support of the general Government.

G. It is not subject to judicial review because it is the purely political act of fixing the amount of a future tax.

H. The opinion of the Court of Customs Appeals fails to distinguish the cases cited by it which dealt with interstate commerce, navigation, bankruptcy, health, pure food, immigration, morals, war, and countervailing or compensatory—retaliatory duty—reciprocity; the delegations being based on, and being accounted for, by the reason that it was *impracticable to handle the thing in any other way.* Congress has been passing tariff acts since the beginning of our Federal Government.

I. Because the section consolidates the legislative and executive.

J. Because the Court of Customs Appeals holds in effect, that fixing the future tax rate is the same as appraisement of a parcel of merchandise from one factory exported on a day certain.

K. The power delegated is not fundamentally, substantially, or actually the same as other powers sometimes delegated.

The Statutes involved are:

Tariff Act of September, 1922, Title I, Par. 12 (42 Stat., 860):

"* * *: Barium dioxide, 4 cents per pound."

Title III, Section 315 (42 Stat., 358, 941):

"Sec. 315. (a) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this Act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this Act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased

duties shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): *Provided*, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in Title I of this Act, or in any amendatory Act.

(b) That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this Act intended, whenever the President, upon investigation of the differences in costs of production of articles provided for in Title I of this Act, wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties prescribed in this Act do not equalize said differences, and shall further find it thereby shown that the said differences in costs of production in the United States and the principal competing country cannot be equalized by proceeding under the provisions of subdivision (a) of this section, he shall make such findings public, together with a description of the articles to which they apply, in such detail as may be necessary for the guidance of appraising officers. In such cases and upon the proclamation of the President becoming effective the ad valorem duty or duty based in whole or in part upon the value of the imported article in the country of exportation shall thereafter be based upon the American selling price, as defined in subdivision (f) of section 402 of this Act, of any similar competitive article manufactured or produced in the United States embraced within the class or kind of imported articles upon which the President has made a proclamation under such subdivision (b) of this section.

The ad valorem rate or rates of duty based upon such American selling price shall be the rate found, upon said investigation by the President, to be shown by the said differences in costs of production necessary to equalize such differences, but no such rate shall be decreased more than 50 per centum of the rate specified in Title I of this Act upon such articles, nor shall any such rate be increased. Such rate or rates of duty shall become effective fifteen days after the date of the said proclamation of the President, whereupon the duties so estimated and provided shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila). If there is any imported article within the class or kind of articles, upon which the President has made public a finding, for which there is no similar competitive article manufactured or produced in the United States, the value of such imported article shall be determined under the provisions of paragraphs (1), (2) and (3) of subdivision (a) of section 402 of this Act.

(c) That in ascertaining the differences in costs of production under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall, when he determines that it is shown that the differences in costs of production have changed or no longer exist which lead to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of Title I of this Act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified.

(d) For the purposes of this section any coal-tar product provided for in paragraphs 27 or 28 of Title I of this Act shall be considered similar to or competitive with any imported coal-tar product which accomplishes results substantially equal to those accomplished by the domestic product when used in substantially the same manner.

(e) The President is authorized to make all needful rules and regulations for carrying out the provisions of this section.

(f) The Secretary of the Treasury is authorized to make such rules and regulations as he may deem necessary for the entry and declaration of imported articles of the class or kind of articles upon which the President has made a proclamation under the provisions of subdivision (b) of this section and for the form of invoice required at time of entry.

The broad scope of the Executive power attempted to be granted here.

1: The President can generally raise or lower the rates, and thus re-write the whole dutiable schedule.

2: He may change the statutory specific rate upward or downward, 50 per cent.

3: He may go further with ad valorem rates. If he be of opinion, based on his judgment, that 50 per cent. change in *ad valorem rates* will not meet the supposed differences between foreign and domestic costs, he must change the method of valuation on the foreign market value, and substitute the American value, which is the price of an American competitive article. This will not expand the limit of "decreases", but it does extend the limit for "increases", perhaps to many hundred per cent. So, as to "increases" in ad valorem rates, the supposed limit of 50 per centum is more apparent than real. The 50 per cent. limitation is not, in all cases a limitation at all; it is a subterfuge; a blind. The change to the American valuation demonstrates this, as well as the power to change the classification. Furthermore, the President has power to fix the rate he desires anywhere between 1 and 50 per centum, upward or downward.

4: He, decreeing the American valuation basis (Subsec. b) may lower the statutory rate to meet the supposed cost differences, but only to the extent

of 50 per centum; which may not be enough. The resultant duty will therefore be more than the supposed foreign and domestic cost differences; an irregularity which boldly departs from the difference in cost formula. And he is specifically empowered to depart from this formula by taking into consideration "prices", and "any other advantages or disadvantages in competition." All this expands and makes more indefinite and more uncertain the supposed "difference in cost-formula" itself; expands it away beyond any ordinary conception of cost-differences. It involves the whole section. The scheme requires the President to equalize cost differences. In changing to the American valuation the statutory rate cannot be increased (although the duties on the American valuation will be many hundred per cent. more duty than the rate on the foreign value), but if the rate of duty applied to the American selling price is not sufficient to equalize the difference in cost, naturally the difference in cost must remain unequalized, and thus the cost formula falls down and the Executive cannot equalize under the statute.

A proposed amendment by Senator Walsh (Montana) to strike out sub-section (c), because it departed from the cost-difference formula, was deliberately voted down (Con. Rec. Vol. 64, part 2, pp. 11226, 11229; August 11, 1922). Mr. McCumber (Con. Rec., p. 12191, 2nd Col., August 10, 1922) frankly said the real thing that the President is to determine is the conditions of competition in our market. Therefore, it appears that power was lodged in sub-section c to depart from the cost difference formula.

5: *He can change the classification* (Mr. Pomerene: Con. Rec. August 10, 1922, p. 12221—1st col.).

Many articles in the dutiable list are classified by schedule, class, name, and by paragraphs. He has the power to say that the statutory classification must be changed to "equalize". Suppose certain things, by judicial decision, have been given a legal classification, in which undisputed rules of construction and rules of component material of chief value, chief use, similitude, wholly or in part, etc., had all aided in the court's conclusions and decisions. This could all be swept aside, and things in chief value of cotton (paragraphs 907-908, 910, 911) or things in chief value of wool (paragraphs 1107, 1108, 1109-1110) could be classified in disregard of the findings of the judicial branch. Imported articles have been classified together according to their genus and species, and placed in paragraphs of tariff acts by themselves. This, Congress has been doing for many years, for various reasons, one of which is to secure a uniformity and consistency in classification with respect to the general scheme that crude and semi-finished articles should receive graded upward rates not as high as fully finished articles. This is the essence of tariff legislation. In the first Act creating a Tariff Commission, it was only given the power of advisorily suggesting to Congress what classifications should be made. Congress was formerly very careful to reserve the right of classification to itself. Under this scheme Congress has abdicated that duty and right to the President. It was not willing to give it to a Commission, but it is willing to give it to the President—a distinction without a difference.

6: He can take into consideration and determine the difference in the wholesale selling price of domestic and foreign articles, in the principal markets of the United States.

7: He can take into consideration and determine advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country.

8: He may take into consideration and determine "any other advantages or disadvantages in competition."

9: He has the power, under sub-section (c) in ascertaining the differences in costs of production, to do four things.

A. Differences in wholesale selling prices: This has nothing to do with cost of production. Yet in almost every tariff report to the President, the selling prices are used as a factor in determination of the differences in costs. The Tariff Commission's own statements in the Appendix (P. 103, 112, 121) show this and also show that in considering retail prices estimation of profit has been made to arrive at a wholesale price.

Proceeding to the fourth part of the section—"Any other advantages or disadvantages in competition": How is he to measure these in dollars and cents? (Con. Rec., August 10, 1922, p. 12217, 2nd col., and p. 12218, 1st col.)

Mr. Walsh (Con. Rec., p. 12217, 2nd col., at bottom, p. 12218, 1st col., at top):

"Everybody realizes that many elements enter into the matter of competition between traders in the same commodity. Many goods sell in this country—particularly women's clothes and perhaps also fabrics of various kinds that are of foreign make—simply because they are of foreign make. One goes to a tailor, who tells him, 'Here is a domestic piece of goods, and here is one of foreign manufacture.' The price is

fixed upon both, but the tailor calls attention to the fact that the one piece is foreign goods, expecting that that will attract the customer, who will pay a higher price for that kind of goods. No one can gainsay the fact that because many articles are of foreign manufacture they command a higher price upon the American market. How shall the President convert the advantage which the foreigner has because his goods are of foreign make, into dollars and cents and thus determine the rate which he is called upon to fix?

"The amendment as originally drawn provided that the President was to take into consideration any advantage arising from the laws. That language is not found in the proposition as it is amended. It now reads 'any other advantages,' but it is really here in effect, although not so expressly stated.

"It is contended that the foreign manufacturer and foreign producer of goods have a decided advantage over our producers in this country because the manufacturers and producers in foreign countries are allowed to combine, while our manufacturers and producers are forbidden to combine, an advantage which must be converted likewise by the President into dollars and cents in order to arrive at the rate which will actually equalize competitive conditions.

"A multitude of factors enter into competition that defy reduction to a mathematical basis."

Preliminary Argument.

It is submitted that, in the forefront of all thought should be that this is taxation; fundamentally different from other kinds of legislation.

The question here is solely one of taxation. It is fundamentally different from other kinds of legislation. Therefore, this consideration must always be present in dealing with every phase and detail of this question.

We shall show that the difference in cost of production at home and abroad cannot be certainly or definitely ascertained.

That differences in cost cannot be found except *arbitrarily,*—by opinion, conjecture, guessing, averaging, deciding between different methods, exercising judgment, etc. There is no judicial review, nor could there be. The levy is a political act and there is no record for review.

There is no policy. *The cost of production formula is no policy at all.* To call differences in cost of production a policy does not make it so, especially when all the statutory things and other things present are exposed, examined, and understood by themselves, and in their juxtarelationship. The various and sundry things to be done, and which are done, are each essentially different in their scope, purpose, and effect, and even vary within their respective classes; if class can be found for them. These various things entering into the attempted ascertainment of facts destroy each other by conflict and being not homogeneous, no definite thing called "policy" can emerge from, or be born of them. These various things cannot be put together as structural shapes, with which and upon which, the house can be finished as a concrete whole. Therefore, the statute fails.

> "It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." (United States v. L. Cohen Grocery Co. (255 U. S., 81; 41 Sup. Ct. Rep., 298, at 300, 1st col.)

The Interstate Commerce cases, the Countervailing Duty cases, and the Currency and Appraisement cases, all dealt with different subject matter; and involved no question of delegation.

This is a case of first impression. It is an innovation; an experiment. Field v. Clark (143 U. S., 649), is clearly distinguishable, as are all the other cases relied on by respondent. Never before has the attempt been made by the legislative branch of the Government to turn over to the Executive branch the power to re-write an whole dutiable schedule of a tariff act. If this be constitutional then all kinds of taxation, inheritance, income, internal revenue, can be similarly fixed by the Executive.

In a recent historic opinion in Myers v. United States (272 U. S., 1; 47 Sup. Ct. Rep., 21), the Chief Justice of the United States says:

> "Their union under the Confederation had not worked well as the members of the Convention knew. Montesquieu's view that the maintenance of independence as between the legislative, the executive, and the judicial branches, was a security for the people had their full approval. Madison in the Convention, 2 Ferrand, Records of the Federal Convention, 56 Kendall v. United States, 12 Pet. 524, 610; 9 L. Ed. 1181. Accordingly, the Constitution was so framed as to vest in the Congress all legislative powers therein granted, to vest in the President the executive power, and to vest in one Supreme Court and such inferior courts as Congress might establish the judicial power. From this division on principle, the reasonable construction of the Constitution must be that the branches should be kept separate *in all cases* in which they were not expressly blended, and the Constitution *should be expounded to blend them no more than it affirmatively requires.* (Italics ours.)

To that conclusive statement of the rule of construction concerning the separation of powers we appeal, and upon it we confidently rely for a holding by this court reversing the judgment below.

Also in Evans v. Gore (253 U. S., 245; 40 Sup. Ct. Rep., 550), Mr. Justice Van Devanter said:

> "The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers, the legislative, the executive, and the judicial, in separate departments, each relatively independent of the others; and it was recognized that without this independence—if it was not made both real and enduring—the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed, or swayed by the other two, especially by the legislative."

It will not be disputed that the President can neither legislate nor levy a tax.

Here the President must choose between alternatives or "vary conclusions" in fixing the amount of a future tax.

To permit him to do so "blends" the executive and legislative powers more than the Constitution affirmatively requires, nay, even against what it expressly forbids.

A supposed standard, which is no standard at all, an uncertain indefinite formula, which is not a fact-finding formula, an alleged policy which is attempted to be expressed by a mere shadowy jumble of confusing and contradictory words, will not avail to avoid the principle so clearly stated by Chief Justice Taft, and thus blend legislative powers with executive powers.

The Constitution should not be so expounded as to permit the President in his discretion to fix the amount of the future tax rate under the guise of an alleged finding of fact, which alleged fact can neither be accurately nor certainly ascertained.

The clause in the Constitution (Article I, Section 1) which carefully deposits legislative power solely in the people's representatives in Congress, reads as follows:

> "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."

The much debated clause (Article I, Section 8) which with equal care and jealousy deposits in the Congress alone this power to destroy, reads:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; * * *."

If these words of the grant to legislate and the grant to tax do not mean that the Federal Executive can neither legislate nor tax, they mean nothing.

They thus comprise a limitation on the right of Congress to delegate to the Executive either power. This is not strictly speaking, a limitation on the legislative power itself, or the taxing power itself; but upon the right of Congress to delegate either taxation or legislation.

In Boyd v. United States (116 U. S., 616, p. 635), it was said:

> "It is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Their motto should be '*obsta principiis.*' We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become *developed by time* and the *practical application* of the objectionable law." (Italics interpolated.)

In Truax v. Corrigan (257 U. S., p. 312; 42 Sup. Court Rep., 124, at p. 131), it was said:

> "Classification like the one with which we are here dealing is said to be the development of the philo-

sophic thought of the world and is opening the door to legalized experiment. *When fundamental rights are thus attempted to be taken away,* however, we may well subject such experiment to attentive judgment. The Constitution was intended—its very purpose was—*to prevent experimentation with the fundamental rights of the individual.*" (Italics interpolated.)

An illustration of the radical innovation in tax legislation here attempted.

All revenue legislation for changes in tax rates must be started in the House of Representatives. The people's representatives in the lower House alone can initiate the levy of a new tax; or the change of an existing tax rate. Once a customs duty is fixed by law, an amendment by a law changing the rate of duty which was first introduced in the Senate and passed by it, before action by the House, would be void.

Although Congress itself can only tax (or change an existing tax rate) in this limited, confined way, by the initiative of the House, the act in controversy provides machinery for the change of a customs tax rate by the initiative of those outside the Halls of Congress, i. e., by the President requesting an investigation, or upon the initiative of the Tariff Commission, or upon the initiative of a domestic manufacturer, or importer, or a consumer petitioning for a change of rate.

The machinery for changing a Congressional rate fixed in the dutiable paragraphs of the Act can only be put in motion by these outsiders. If none of them makes the start the Congressional rate fixed in the Act remains undisturbed.

In United States ex rel. Norwegian Nitrogen Products Co., Inc. v. Tariff Commission, decided April 11, 1927 (274 U. S., 106; advance sheets) Mr. Justice Stone said:

"Under Section 315 (c) and (e) of the Tariff Act of 1922, the President is given authority to require an investigation by the Commission and it is its duty to make one when so required. There is no other provision of the Act placing any duty on the Commission to make such an investigation. When not so requested by the President action by the Commission is discretionary. Under its rules, it is optional with it whether it will employ its resources for investigation sought by an interested party."

Thus, some one entirely outside the Halls of Congress must start the executive machinery which may result in a change of the statutory rate, i. e., in an amendment of the rate fixed by Congress substituting a new rate of tax by executive action.

This is difficult to reconcile with Section 7, of Article 1, of the Constitution, which provides that:

"All bills for raising revenue shall originate in the House of Representatives; * * *."

This vividly portrays the radical innovation here attempted from all previous tax legislation.

General Argument.

In this case we challenge the constitutionality of the so-called Flexible Tariff, as embodied in Section 315, of the Tariff Act of September 21, 1922, as taxation by executive fiat; hitherto unknown in our history.

We challenge the alleged standard on which it purports to be based—difference in cost of production at home and abroad—as no standard at all, as incapable of definite ascertainment, the result depending on the will and inclination of the President; as involving executive discretion and judgment at every stage of a complicated, confused

and involved process. Consequently the alleged finding under it necessarily becomes a mere discretionary guess—a decision between different results—in order to fix the amount of the equalizing tax. That is the exercise of the very essence of the legislative trust, and of the power to fix the tax rate committed by the people to Congress alone.

We note here in determining the difference in cost of production at home and abroad the President may consider "any other advantages or disadvantages in competition." This is not related to difference in cost of production—has nothing to do with it. Yet it has been cited as used in every proclamation issued by the President.

If a finding can be made on "any other advantages or disadvantages in competition", then no argument is necessary to show the unconstitutionality of this act. Every one must admit, that an executive finding of a tariff rate based upon the *differences between all advantages and disadvantages in competition,* is purely an act of legislation and, therefore, unconstitutional.

Congress itself admitted it when it amended this very scheme as first proposed, for executive fixing of tariff rates upon the *differences in competitive conditions* at home and abroad, and substituted *differences in cost of production* at home and abroad. There was a fight, however, and the radical advocates of this delegation successfully insisted on the absurdity, as embodied in sub-division (c), that the President should still use "any other advantages or disadvantages in competition" in finding the difference in cost of production at home and abroad.

Section 315 is unconstitutional as an illegal delegation, because executive fixing of tariff rates, based on the difference in "advantages or disadvantages in competition," is plainly and unmistakably on its face an illegal delegation of legislative power and taxing power, irrespective of the claimed legality of a finding based on differences in cost of production.

We assert that when the executive fixes the amount of

the future tax rate (under and within the limits provided by Section 315) he taxes the citizen; he legislates for the people; he exercises the power to destroy. If exercised within those limits no court can review his act; nor stop it because confiscatory; nor examine it to see if it is based upon legally sufficient evidence; nor quash it if flatly contrary to all the evidence, i. e.,—an arbitrary fiat; or because it ignores the Tariff Commission's finding (as has already come to pass in sugar and linseed oil); nor enquire into his motives or good faith in acting or failing to act. It does not involve a justiciable subject matter. The courts cannot fix the future tax rates, nor review the discretion which such determination necessarily involves. It is not subject to judicial review, because it consists of the purely legislative act of fixing the amount of a future tax, i. e.,—the purely political act of levying a new tax.

If Section 315 is constitutional the express constitutional prohibitions confining the power of legislation, and particularly the power of taxation, to the people's representatives are completely broken down. All lines of demarkation between legislative powers and executive powers are forever removed. Such distinction becomes a mere play upon words. Such a holding completely nullifies the language of Section I, of Article 1, and Section 8, of Article 1, of the Constitution. Such a holding authorizes and invites Congress to pass its entire responsibility over the levy of taxation to an irresponsible bureaucracy, which before this act had not yet invaded this field; which, up to this, has never been commissioned to fix the amount of the tax rate; either for customs taxes, income taxes, inheritance taxes, or any other taxes. The principle here involved necessarily affects all taxation as well as customs taxation. If the door of this attempted delegation is opened for one kind of taxation, it is opened for all.

Once opened it gives blanket authority to Congress to abdicate its entire trust over this power to destroy, by

merely declaring a few general principles of taxation; one for customs, another for income tax, another for inheritance tax, etc., leaving the bureaucracy to do the rest.

If the Flexible Tariff is sustained, Congress can commit the ascertainment of the actual rate of every Federal tax the citizen must pay, on income, on inheritance, on customs, on everything, to the choice, judgment, and discretion of executive functionaries.

This is the revolution in the American system of taxation for which this so-called flexible tariff opens the door. From that conclusion there is no escape.

Judge Brown, of the trial court, in his dissenting opinion, points out a number of patent instances, as shown by the Tariff Commission's Reports, of the necessary exercise of judgment and discretion leading to different results in making findings of foreign and domestic cost differences. They have actually decided:

(1) What area (if not the whole United States) they shall cover to compare with the competing Canadian section in the production of, say, hard spring wheat, and whether winter wheat shall be included in the investigation; the tariff rate applying to all wheat?

(2) Whether costs of one current year should be compared or an average over a period of years, say three, taken for comparison.

(3) Whether transportation costs of the foreign and domestic articles to a common market place should be included or excluded from costs of production.

(NOTE.—If transportation costs to a common market place can be considered, which shall be chosen as between the differing cost of transporting goods, say to a common market in New York, from producers located in Texas, California, Michigan and Maine. An attempt at averaging these would necessarily be arbitrary and plainly lie in discretion. No averaging would satisfy the long-haul

producer. If there happens to be more than one common market place, the difficulty, uncertainty, and hence the discretion, increases.)

(4) Whether the difference between foreign and domestic costs should be measured between points representing a weighted average cost in the two countries, respectively, or at a point representing a cost at or below which the bulk of the American product is produced.

(5) Whether land in the competitive area investigated to determine an agricultural duty should be taken at its rental value or as for a fair return at interest upon its capital value.

(6) What division of costs shall be apportioned between principal and by-products, shown by Page, to be necessarily arbitrary.

(7) The readjustment *vel non* of actual costs to an estimated production equivalent to a given percentage of plant capacity.

After citing these actual decisions Judge Brown says:

> "The result of any attempt to choose any method or rule whatsoever for averaging the costs of many different producers, whether based upon 'a weighted average cost' or upon a 'bulk line production cost' or upon any other so-called scientific method, necessarily becomes a mere discretionary guess, i. e., a question of where we choose to draw the line. The final figure arrived at manifestly must depend upon the particular method of averaging which is selected. A method does not become accurate, and its result becomes certain, by merely giving the process a scientific name. A dream does not become a reality through descriptive terminology. A guess does not become a fact by calling it a finding.

* * * * * * * * *

> Any generalization from such varying factors, however intelligently and painstakingly arrived at by executive authority, must, in the nature of the case, be largely a matter of individual opinion and judgment. As all the factors which make up the finding are themselves variable and uncertain it is impossible that the generalization from them could attain to greater certainty or be any more than a rough approximation like the finding of damages, in tort, by a jury."

In the Appendix H and J, pages 98 and 106, are the Tariff Commission's own preliminary statements, which describe the details of what *must be decided* by them; showing at a glance that it would be inaccurate, false, and misleading to attempt to describe the operation of Section 315, as a *mere fact-finding process.* On the contrary, they unmistakeably disclose the exercise of the legislative discretion at each step in a complicated investigation.

There is absolutely no governmental necessity for the attempted delegation of customs taxation. Congress, without such attempt at abdicating its functions, has itself fixed the rate of all tariff taxes, and of all other Federal taxes, since the formation of our general Government. The excuse can not be advanced here, as in delegations under the commerce clause (all of which are subject to judicial review for confiscation or arbitrary action), that the wheels of Government will stop if this Congressional abdication of power and responsibility is not permitted. That claim is completely negatived by the rates actually fixed in the dutiable paragraphs of this very Act, and all other tariff acts previously passed by Congress, during peace and war, from the beginning.

This is a case of first impression. Section 315, in the breadth and radical scope of its attempted delegation, is totally unlike any legislation heretofore passed by Congress. It is pregnant with dangerous new possibilities,

changing the whole future course of our constitutional history. Nothing approaching it, or similar to it, has heretofore been attempted.

Conclusive statements have been made by many distinguished economists and statesmen; some of them engaged in the actual operation of this law showing that the finding which this Section 315 directs, of the alleged difference in cost of production at home and abroad, cannot be made *without the exercise of discretion, choice* and *judgment* in using or discarding different factors, *in deciding between different results.* That is the legislative act of fixing the amount of the future tax rate which the Constitution forbids the Executive to do (See Appendix D, p. 93; E, p. 94; G, p. 95; K, p. 127; L, p. 143).

The case of Field v. Clark, 143 U. S., 649, is the only *tax* case in which the question here at issue, i. e., the legality of the delegation of the power to tax, was raised in brief or argument, or discussed in the opinions of the Supreme Court. The spirit and principles of that case flow from and are maintained on (1) reciprocity; (2) retaliation; the one bespeaking the other. There was no grant of power to determine the differences in cost of production (the fact that a foreigner's cost of production is less that our costs is not discrimination against us); to change the classification; to change from a foreign valuation to an American valuation; to amend the statutory rate, upward or downward; to determine price competition; to determine other advantages or disadvantages in competition.

In the Field case four tax rates were named in the act itself. The President did not calculate, estimate, speculate or guess at their amount, or use an indefinite formula; as he does here.

In the Field case the President was given power to put the statutory rate into effect against such countries as to which he could find as a fact discriminated against our export trade by their laws. This was a very simple find-

ing, based upon a certainly ascertainable fact, concerning which no intelligent minds could possibly differ. This, the majority of the Supreme Court held, involved no discretion to make the law on the President's part.

In the Field case the President most emphatically *did not investigate trade conditions in the United States,* and compare, balance and measure them with *competitive trade conditions in foreign countries,* as the Court of Customs Appeals erroneously stated and as our opponents asserted in their brief below, and in their brief opposing certiorari.

On the contrary, he simply ascertained *from the terms of the foreign law,* whether a country exporting sugar, coffee, tea and hides to the United States discriminated by its law against our *export trade.*

He looked in the foreign statute for a discriminating tariff rate against American goods. If he found it there he proclaimed in effect the tariff rates, written by Congress for that contingency, on sugar, coffee, tea and hides.

It is interesting to note how far the doctrine in the Field case is attempted to be extended by the Court below for (R., 92), in adopting the theory of our opponents, the Court said:

> "We are unable to perceive the difference. In each case, the effort of Congress was to protect products of the United States which might be threatened by injurious *competitive products from abroad*—in one case by unfair governmental methods, in the other, by differing business conditions." (Italics ours.)

With great respect, we submit that statement is a complete misunderstanding of what the President did in the Field case, which had nothing to do with protection of *American* products in our market, but related solely to *retaliation* against the *foreigner's goods* for his discrimination against America's *exports.*

The plain inference from Mr. Justice Harlan's opinion in the Field case is that, had he found (as the dissenting

justices claimed) that the reciprocity provision involved executive discretion and judgment, choice between different results (as does the flexible tariff), he would have held the Act unconstitutional.

No one can reasonably contend that using "any other advantages or disadvantages in competition," in order to evolve a tariff rate, is merely finding a "fact" on which a statute can be made to take effect or depend. Nothing indefinite like that was in the reciprocity law sustained in Field v. Clark.

Difference in cost of production is no standard, because it involves choices between different results at every stage, but "any other advantages or disadvantages in competition" is no standard on its face. There is nothing definite or certain about the expression. Yet it is there in the Act, and it cannot be ignored. Its presence makes Section 315 unconstitutional, irrespective of the unconstitutionality of the "difference in cost of production" formula.

Under the flexible tariff the President fixes the rate of a future tax, as a result of estimating costs in individual factories or farms, first chosen as representative, and after finding what goods are like or similar, and which is the principal competing country, and after arbitrarily (there is no other way) separating costs of joint or by-products; then, after choosing between a weighted average cost, or a bulk-line cost (itself an uncertain term), or some other method, and then applying the chosen method of averaging at the desired point, and then averaging the cost of transportation to a common market; and, after having chosen whether the investigation shall cover one year or five years, with changing conditions, then comparing these with foreign costs arrived at in the same uncertain and indefinite way; on top of all this, using "any other advantages or disadvantages in competition" and "selling prices" as mysterious further methods of finding differences in cost of production.

Discretion, choice between different results, decision and judgment, is experienced at every stage of this process.

To compare such an elaborate exercise of the mind with the simple process of looking into a book, as in the Field case, in order to detect foreign discrimination against our export trade is impossible. The two processes are intrinsically and fundamentally different. There is no comparison. To make such a comparison is as legally absurd as to liken the flexible tariff to the ad valorem appraisement of merchandise.

The latter claimed analogy is tantamount to saying that there is no difference between fixing the rate of a future tax for all importations and applying an existing rate to a particular shipment on a day certain from a particular foreign factory. Or that an act of new legislation is the same thing as a legal contest over the application of an existing law to a particular importation.

There is no substantial dispute in this case that the action of fixing a tariff rate under Section 315 is legislation. The comparison is between the action of the President in merely finding a simple fact of discrimination against our export trade, upon which the rate already named takes effect, as in Field v. Clark, or conjecturing differences in costs of production while considering *"any other advantages or disadvantages in competition,"* and "selling prices" from which complicated action (above described) a new rate of taxation emerges.

The former this Court held in the Field case could be legally done. For the latter (Section 315) there is no legal precedent or authority. No case has sustained any tax statute remotely resembling it.

It is this new adventure in law making, this new experiment in the delegation of the taxing power to the Executive, which we attack as unconstitutional.

The countervailing duty cases, Downs v. U. S., 187 U. S., 496, and Nicholas v. U. S., 249, U. S., 34, and the currency cases, such as Cramer v. Arthur, 102 U. S., 612, and Arthur v. Richards, 90 U. S., 259; Hadden v. Merritt, 115 U. S., 25; U. S. v. Klingenberg, 153 U. S., 93; are not

in point, because in them no question was raised of delegating legislative power or taxing power; and of course no such question was discussed in the opinions of the Supreme Court.

The tax levying power stands in a class by itself, because, being the exercise of the power to destroy. The Executive action under the flexible tariff is not subject to judicial review for confiscatory or arbitrary action or unreasonableness, or to review the discretion imposed in fixing a new tax rate within the limits prescribed by the section.

The Solicitor General (now Mr. Chief Justice Taft) said in the Field case, 143 U. S., 649, No. 1052, October Term, 1891, in brief for the United States, page 87:

> "If the tariffs of the foreign countries are reciprocally reasonable and equal toward the productions of the United States or are made so, then their sugar, hides, coffee, and tea are to come in free; if the foreign tariffs are not so reciprocally equal and reasonable, then certain duties are to be imposed on the four articles from those countries. The President is required to determine whether the foreign tariffs are reciprocally equal and reasonable to merchandise of the United States or not, and when he determines that they are not, he must proclaim the fact, and the free list is suspended and duties are imposed."

Compare this with Section 315 changing the whole dutiable schedule within a range of 100 per cent. from the highest changed rate to the lowest changed rate, and even more if American selling price is used.

POINT 1.

The difference in cost of production at home and abroad cannot be found as a fact without using discretion and judgment, choice between different results, at every stage, thus expressing the exercise of the legislative will.

In the Appendix are statements from:

A. Thomas Walker Page, of the Institute of Economics, Chairman of the Tariff Commission just prior to the passage of this law.

B. Prof. F. W. Taussig, of Harvard, who was the first Chairman of the Tariff Commission until succeeded by Dr. Page.

C. Philip G. Wright, also of the Institute of Economics and formerly an expert employed by the Tariff Commission.

D. Thomas O. Marvin, present Chairman of the Tariff Commission, who succeeded Dr. Page.

E. Alfred Pearce Dennis, the present Vice-Chairman of the Tariff Commission.

F. Dr. W. H. Wynne, of Williams College.

G. Former President, William Howard Taft, and President Coolidge, Senator Thomas J. Walsh and Senator Reed of Missouri, and Senator Underwood.

It conclusively appears from their combined statements and from the preliminary statements of the Tariff Commission (Appendix H and J).

(1) That "the differences in cost of production at home and abroad" presents an alleged formula which in no reasonable sense of the word describes a fact-finding process. On the contrary, discretion, judgment, choice between different results, are necessarily

involved in making the "findings of cost difference" required.

(2) That "representative" costs among many different producers must be selected.

(3) That choice must be made between different methods of averaging, leading to different results.

(4) That costs of by-products and joint products must be allocated by some arbitrarily chosen rule.

(5) That the period of time the investigation is to cover, necessarily leading to different results, must always be decided.

(6) That merely deciding what are like or similar goods, involves nice and delicate discrimination.

(7) That deciding what, for purposes of the statute, is the principal competing country, often involves uncertainties.

(8) That the so-called bulk-line and weighted average methods of averaging, themselves involve uncertainties in application.

(9) That from the beginning to the end of the investigation, many things have to be decided and their application determined, about which reasonable minds are sure to differ, and which involve a legislative discretion.

The section provides for (1) "Like or similar articles; (2) "wholly or in part the growth or product of competing foreign countries"; (3) "principal competing country."

As to (1)—"Like or similar articles": This must be determined at the beginning of every investigation of production costs. First then—what is an article? Second—With what foreign article is the domestic article to be compared? Is an article something having positive physical form—dimensions, or a gas, liquid, powder, or some impalpable thing? It is true that many articles, not physically identical, come in competition. Could a domes-

tic article, subject to low-cost competition, be protected (and that is the object of the statute) by raising the duty, if the foreign article was better and not just like the domestic article? Competitive articles might fall under general designations, but may be produced in varying grades, so that the foreign article would meet a demand quite different from that of the domestic article. Articles in a class are of different grades. The cost of the high-grade could not be compared with the low-grade. Therefore, if the cost differences are to be found to "equalize", some allowance must be made in the judgment of the delegee, to represent different elements. The finding of the President in such a situation would be an impossible task; except arbitrarily. The legal question is—would such process and questions constitute a *finding of "like or similar"*. It can only be done by constructing an artificial or ideal identity.

Even physical identity has limitations. Wheat is wheat; yet in making cost comparisons of wheat it was confined to *hard spring wheat,* produced in three western provinces of Canada, and four States, Minnesota, North Dakota, South Dakota, and Montana, and did not include *hard winter wheat,* produced in Nebraska and Kansas. Note Wheat and Wheat Products, Report of United States Tariff Commission, to the President (Appendix I, p. 102).

What we have said here as to "like or similar", by a parallel of reasoning, applies equally to "whether wholly or in part the growth or product" and "principal competing country."

Consider a raw commodity of the United States and a "like or similar" imported article which has been partly manufactured from raw material produced in another country than the country of exportation, or principal competing country. Does the comparison require production-costs of only one country, or both countries, to be taken? Can the price paid by the foreign manufacturer for the raw material be regarded the equivalent of costs, or are the conversion costs in a foreign country to be added to

the raw material? Nakedly raw material costs include no profit; yet in the competing country manufacturing the raw material of the other country, profit does figure as an element of cost.

The costs of production are to be measured by the "principal competing country." Importations may come in substantially equal quantities from different foreign countries, or in one year larger quantities from one than another. The next year this may be reversed. Production costs are never precisely the same in two countries. The application of the amended rate is in prospective and the ascertainment of the costs is retrospective. It therefore may happen that an increase in duty, measured by the country having the lower costs, may be applied to importations from a country having a higher cost production. How is the President to equalize and find a cost difference as a fact at the time of proclamation?

Choosing what are called representative costs involves the exercise of legislative discretion; exercised before one commences to allocate the separate costs of joint production or before one chooses an arbitrary rule for averaging the costs of many different producers or before one chooses between the many other alternatives involved in this process.

The Tariff Commission cannot examine the cost of raising wheat in every farm in the United States, so the Commission must designate so-called representative farms and examine them. This discretion of selection, and how it is exercised, must affect, and does affect the final result. It is obvious it would always be a matter of opinion as to which farms were representative. How can this be called a *mere fact-finding process?*

The necessity of choosing representative producers will arise in every investigation of every product of the farm or factory produced all over the country. The Tariff Commission's action in wheat investigations (referred to in Appendix I, p. 102) shows that certain things were

selected and others rejected. Certain things were held to be representative and others non-representative. The tariff rate applies to all wheat, hard and soft, summer and winter; yet the Tariff Commission did not include all of these, but confined itself to considering only one kind of wheat. Nor did it take all the territory of the United States into consideration. The Government's position must be that this court must hold that all this is a mere fact-finding process and that it makes no difference whether the Executive in dealing with complex and multiplicity of questions and things, which cannot be accurately determined, which require discrimination and judgment and choice at every stage of the process by the delegee, is not legislation, but simply a mere fact-finding process.

We now refer again to and continue the preliminary statements of the Tariff Commission (quoted in full in Appendix) to expose through detail the non-existence of the fact of differences in the *cost of production per se* at home and abroad, and that in any event the proclaimed finding of fact is not a mere finding of fact; is not a definite finding of fact; and is only arrived at by the use of legislative discretion, through the exercise of judgment, conjecture, speculation, guess and choices, and arbitrary action.

Consider the following questions upon which by their preliminary statements the Commission asked for light and discussion at their hearings.

A. Purchasing expense abroad of importers in marketing hats in this country is sometimes taken as a factor in cost of production.
B. Grouping of competitive (?) types.
C. Costs may be computed in several ways. In the Cheese case, three ways for selection were open.
D. Income factors, sales, allocation, method. In relation to farming, distribution of costs was made on the *allocation method.*

E. What period of time is to be taken for costs in this country and abroad? Is it 1, 2 or 3 years? Note Wheat and Wheat Products; Sugar.

F. Do differences in economic, financial, and climatic conditions in *various areas* affect the validity of book-values and for comparison purposes? Sugar problem.

G. (1) What is to be done when the data of one company is unreliable? What is to be done when cost data cannot be obtained? (2) *What is the area of competition?* What is to be done when foreign cost data cannot be secured? What is to be done if there are substantial chemical or physical differences, as well as differences in grade?—Calcined Magnesite question.

H. Is it permissible to resort to consular invoice prices and make estimated deductions therefrom for profit contained, or supposed to be contained therein, in order to fix a foreign cost?

I. Is classification of size of an article or by degree of purity to govern?

J. Depletion of royalty; costs of production at points of competition; are questions involved.

K. Shall a wet season (1923-1924 in China) be taken in consideration to determine the year's period?

L. When costs taken by field investigation involve a plant whose production in relation to its capacity is considerably below normal, who is to determine normality? Sodium Nitrite problem.

M. Shall the cost of production include a fair return on capital employed, or shall the Commission take into account only such interest as has been paid on borrowed capital?

N. There are at least three possible alternatives present in arriving at cost differences: (1) The measure of difference between the ascertained foreign cost plus ocean freight and the ascertained domestic costs plus the short haul freight. (2) The measure of difference

between the ascertained cost plus ocean freight and the domestic cost plus the long haul freight. (3) The measure of the difference between the ascertained foreign cost plus ocean freight and some kind of average of the domestic freights.—This involves the determination of a common market and the principal competing market.

O. Farm costs—This involves one of the greatest combination of uncertainties. Farmers do not keep adequate records of their costs. Records are kept of receipts. Is the farmer's individual labor, and the individual labor of the farmer's wife or children, their food consumption or maintenance to be considered as a cost, and how are they to be definitely ascertained? What is a representative farm? What are representative prices? What is a principal market? What years are to be taken? What areas cover? What part does the long and short haul play? What is the principal competing country? Is the principal competing country continuing, or only occasionally a competing country? Are farming conditions stable so that estimated costs arrived at for a certain period will measure the difference for future periods?

POINT 2.

The fact that the cost of joint products and by-products cannot be separated except arbitrarily, that alone, and by itself, makes Section 315 unconstitutional.

A chain is no stronger than its weakest link. As a matter of common knowledge, in modern industry, at least 50 per cent., probably 75 per cent. of all articles of commerce are either joint products or by-products. Relatively few farms or factories produce one single article.

Every one must see that the cost of joint products and by-products cannot be separated except arbitrarily for the simple reason that their *separate costs do not exist.*

There is no rational process by which the separate cost of wool can be separated from that of mutton, of gasoline from kerosene and lubricating oil, of hides from beef, cotton from seed, milk from butter, cows from both, or bran, shorts, etc., from wheat and flour, or of any other joint or by-products.

There is no separate cost to find. Making an allotment or allocation of so much to hides and so much to beef, for instance, is not to approach or depart from accuracy. Terms of relative accuracy do not apply to a non-existent quantity. We cannot guess at something which does not exist or get near it or away from it. There is nothing there to find. Nothing to compare our arbitrary allotment with. The Tariff Commission did it arbitrarily (there is no other way) by basing costs of joint products on the amount of the separate receipts from each joint product. Page has demonstrated conclusively that this is a purely arbitrary separation bearing no relation to actual fact. (See quotation below.)

No other method has ever been suggested or can be suggested for dividing the costs between two or more products jointly manufactured. There is no such rational method. Any method which could possibly be suggested necessarily would be equally arbitrary. As before stated something which does not separately exist cannot be approximated or even intelligently guessed at. All any one can say is that he will simply arbitrarily allot so much of the joint cost to A, so much to B, and so much to C. If in so doing he uses some high sounding scientific name for the arbitrary rule he so applies, that does not make it any the less arbitrary. Nor does it make the finding made under such rule *a finding of fact.*

Consequently all "findings" of tariff rates s made under Sec. 315 of joint products and by-product must be based upon a mere arbitrary guess, or allotment.

This the legislature itself may do, but it cannot delegate power to do it to the Executive and truthfully call it a

mere fact finding process. It results from this that fixing of tariff rates under this process for all joint products and by-products is plainly and unmistakably unconstitutional. The Section (315) must operate as a whole. It cannot be constitutional when applied to *singly* manufactured products and unconstitutional when applied to joint products and by-products. That would be a constitutional absurdity. We therefore submit that the non-existence of separate costs for by-products and jointly manufactured products (which are legion) entirely invalidates Section 315, makes the whole scheme unconstitutional.

To the producer it is a matter of little moment how much of the cost shall be allocated to various by-products; that is to say, how much to "a", how much to "b", and how much to "c". But to the tariff-maker, it is a matter of vital importance if he is to put one duty on "a", another duty on "b", and another duty on "c", and he must measure those duties by the difference between the domestic and foreign costs of producing these several things.

Extract from Dr. Thomas Walker Page's book, "Making the Tariff in the United States" (Chapter IV, pages 85, 86, 87):

(85) "Even in a simple pastoral industry, such as sheep husbandry, this problem is encountered. It may be noted in passing that this industry also presents a number of other problems, which arise in determining what are to be accepted as elements of costs. Should rent on the land used and interest on the total investment be regarded as items of cost, and, if so, at what rate? On the other hand, should account be taken of certain indirect but valuable considerations, such as the destruction of weeds or the improvement of the soil; and if so, how can their value be appraised? But aside from any question as to how the total cost is constituted, what is the basis on which it can be divided between the wool and the meat pro-

duced? The existing tariff law imposes duties at different rates on sheep, on mutton, on lamb, and on several varieties of wool. If these duties are to be measured by the difference between domestic and foreign costs, the total costs of sheep husbandry must in some way be distributed amongst the different products on which the duties are levied.

The basis of distribution adopted by the Tariff Commission is doubtless as good as any. Thus the commission reported that in Montana during 1919 the expenses for 82,122 sheep were $9.93 a head. This was made up of labor, interest at 6 per cent on in-
(86) vestment, feed, fees and rental, shearing, depreciation and miscellaneous. It is clear that no important item except shearing was incurred exclusively for a single product. Expenditures for labor, feed, and the rest were made for producing both meat and wool. The commission divided the joint costs between these two products in proportion to the sheep owners' receipts from each of them. In that year it happened that 61 per cent of the total receipts in Montana came from wool and 39 per cent from mutton and lambs. As the average amount of wool sheared was slightly over eight pounds per head, this method of division showed the cost of wool in Montana to be more than 76 cents a pound. In the other range states it varied that year between 32 cents in Texas and about 49 cents in Idaho.

The fallacy of the method is obvious, since it makes it appear that the smaller the receipts from either product the lower will its cost be. This is clearly contrary to fact. Thus a hard winter with feed scarce and dear, followed by bad weather during the lambing season, compels the flock owner to make unusual outlays to save any lambs at all. In spite of his efforts the lamb crop is apt to be poor and the lambs stunted and unable to make satisfactory development, so that

his receipts from them is small. Under such circumstances the commission's system of accounting would show that the cost of the lambs was exceptionally low and that of wool proportionately high; and by a pernicious paradox if the lamb crop were a total failure, the lambs would have cost nothing at all. Conversely,
(87) conditions favorable to a good lamb crop would appear to raise the cost of lambs and thereby lower the cost of wool. It should be noted, however, that receipts vary not only with conditions of production but also with changes in the market, and the price received for lambs is determined by causes quite remote from those that determine the price of wool. Thus a rise for any reason in the price of wool would appear, regardless of the actual outlays incurred, to lower the cost of growing lambs."

We also submit a statement made by Mr. Page before the Robinson Investigating Committee of the Tariff Commission in Senate Resolution No. 162, pages 45 and 46:

"Mr. Page: I think that there are enough uncertainties in business, even under the best of conditions, and I think that the feeling of uncertainty and of insecurity is greatly increased when it is impossible for the producer or merchant to know at what time the rates of the tariff are going to be changed. When they feel, at least, that they are under a constant threat of a change in the tax on imports, they cannot, with any feeling of safety, make their commitments for future operations. It is, therefore, a deterrent to business. It prevents sound business rather than helps sound business. It adds a speculative element which I think is highly undesirable. I might say also that one of the serious defects in the proposal for a flexible tariff is, as I have said elsewhere, the danger that the flexibility will be perverse. *You can not*

make investigations which will justify a change in the rate until the period of production is completed, to which the investigation relates. Now, the following period of production may be subject to conditions that are entirely different from the period which has been under investigation. If, therefore, you change your rates so as to accord with results or investigation of one period they might be totally wrong for the period that follows.

Perhaps I might illustrate that with an example. An investigation of the cost of producing wheat in this country and in Canada, made by the Tariff Commission, showed a considerable difference to the advantage of Canada. Those of you who are familiar with that investigation will remember that the difference in cost was due, in large measure, to a very much smaller yield per acre on American farms. The actual outlays per acre were smaller in this country than in Canada, but the years for which those investigations were made were years of poor yield south of the border and of high yield north of the border. Now, on the basis of that investigation the rate was raised by proclamation of the President. It happens that in the year following that increase of rate, conditions were reversed. They had serious droughts in Canada and their yield per acre was very materially reduced. They had a favorable season on this side of the border and the yield per acre was greatly increased, and if the investigation did cover the subsequent year, to judge from the figures that were compiled by the Tariff Commission, I should say that the likelihood of a change in the rate of duty, if it had been made at all, would have been downward rather than upward."

POINT 3.

There is no magic about the word "finding."

The act of making the "finding" itself has no creative power. Arrived at as it must be, by choosing between different results, that does not make it into a "fact" by such choice or decision, by asserted analogy to the finding of a jury verdict at law or a Chancellor's finding of facts in equity. It is manifest that the operation and effect of a statute prescribing a rate of taxation, or other rule for the future, cannot be made to take effect or depend, upon the result of a jury verdict or upon a Chancellor's decree. Yet such verdict or decree in a contest over disputed fact is absolutely binding upon the parties in a litigation.

Had the "finding" here, as part of a legislative process, the same effect, it would make a conjecture into a certainty by the simple act of compiling or tabulating the guess. *Thus something uncertain and inaccurate would evolve by a sort of creative power into an accurate certainty.*

That is a perfectly proper and legal method of binding parties to a litigation; but has no relation to delegating to the Executive the finding of a fact upon which the operation of a statute can be made to take effect or depend.

As the dissenting trial Judge said:

> "A method does not become accurate and its result becomes certain by merely giving the process a scientific name.
>
> "A dream does not become a reality through descriptive terminology. A guess does not become a fact by calling it a finding."

If it did, the act of making the formal finding would *possess creative power.* The figures calculated would be-

come a fact simply because the President said he found it. That is the result of the Government's position in this case.

The fact to be found here must be such as can be definitely and certainly ascertained and is distinguished from facts determined by litigation. We draw from Judge Brown's opinion (R., p. 57):

> "But here we are *not* dealing with litigation or with something which can be determined by the processes of litigation. We are dealing with the purely political matter of the levy of a tax upon the citizen * * *. This is a political process by which the citizen, acting through his federal legislative agents in Congress, fixes the necessary contributions for the support of the Federal Government." (Italics ours.)

His opinion divides facts (R., 58) into two kinds—*definite* facts and *approximate* facts (R., 56, 57). *Definite* facts are those to which courts refer when they say that the Legislature may delegate the finding of a fact to Executive authority, upon which finding, the operation of a statute *already complete* in itself, may depend. *Definite* facts, as defined by the dictionary, are those which are realities, events, and truths (R., 57). *Approximate* facts are like those found by a jury, with or without punitive damages. He holds therefore, that, the fact here to be found must be in the definite class, but because of the *insuperable* and *inherent* difficulties, the things found (not facts in the definite class) fall in the second class of approximate or indefinite facts.

POINT 4.

There is no argument from necessity here. This completely distinguishes the cases relied on by the Government, which discuss the delegation of legislative power.

The argument from necessity by which some delegations have been justified is based upon the idea that the thing cannot be done in any other way. When it cannot be done by the delegee except by arbitrary guesswork, such argument from necessity completely fails. Congress itself can guess (and no one can challenge), at the difference in cost of production at home and abroad, but that is legislation and not as shown the mere finding of fact. But it cannot transfer such guessing power to another, on the ground of *necessity when the delegee himself cannot do it accurately any more than Congress can.*

For instance, neither Congress nor the delegee can separate (except arbitrarily), the cost of production of joint products, or by-products, which comprise many articles of commerce. What is the necessity then of transferring from one who cannot do it (except arbitrarily), to another, who also cannot do it (except arbitrarily)?

Thus, the argument from necessity completely fails from every point of view.

We have here an impossible, unworkable process. It does not become possible or workable because the person (Congress), to whom the people have committed the power to attempt to do it inaccurately, delegates it to another (Executive), who also must do it inaccurately. We are sometimes governed or influenced by sounds and forms and nomenclature and persons. But shifting forms, changing nomenclature, and substituting other persons, does not render possible what is inherently impossible.

The complete breakdown of any argument from necessity as sanction for Section 315, because Congress has it-

self been fixing tariff rates without difficulty, since the beginning, completely distinguishes the cases cited by the Government where the question of delegating legislative power was *actually* raised and *discussed* by this court.

Congress could not pick out the impure teas to exclude, or discriminate between pure and impure grades of the same tea. Hence in Buttfield v. Stranahan, 192 U. S., 470, this court rightly held that the necessity justified the delegation, because without it the plenary power of Congress to exclude impure merchandise from entry would be ineffective.

After Congress has been fixing tariff rates for 135 years, no one can say that if Section 315 is held unconstitutional, the plenary power of Congress to fix tariff rates has been rendered ineffective.

Note also that the fact of impurity for food purposes was a simple one, easily ascertainable, and easy to apply. Note also that there was judicial review for arbitrary action. See Waite v. Macy, 246 U. S., 606, T. D. 37647.

And so with U. S. v. Grimaud, 220 U. S., 506. There it was necessary for Congress to leave to the Secretary of Agriculture the making of regulations for the protection and preservation of a Forest Reservation. That could not be done effectively by Congress itself. It was impractical to do it in any other way. But even then it was Congress itself which made a breach of the regulations a crime, and Congress itself which fixed the penalty. Moreover the party there complaining had a court and jury pass on him before conviction.

As to the Bridge cases: Union Bridge Co. v. U. S., 204 U. S., 364, Monongahela Bridge Co. v. U. S., 216 U. S., 177, and Hannibal Bridge Co. v. U. S., 221 U S., 194. There it was *impracticable* for Congress to pick out the obstructions to navigation all over the country and separately deal with each. Note also that the fact of obstruction was easily ascertainable by simple measurements. A fact concerning which reasonable minds would not differ.

Moreover, any arbitrary abuse of power by the Secretary of War could have been stopped by the courts.

In U. S. v. Chemical Foundation, 272 U. S., 1. It was necessary in order to effectively use enemy property for the prosecution of the war to make the limitation on the excepted class through the action of the President, fixing the terms of certain sales.

In Field v. Clark (completely distinguished on other grounds in the General Argument, pp. 25, 26, 27), the necessity of executive action was equally apparent, in order to effectively and promptly compel reciprocity by retaliation against a discrimination in a foreign law against American exports. Congress could not promptly and effectively do that itself.

The same necessity clearly appears in the embargo in In Re Brig Aurora, 7 Cranch (11 U. S.), 382.

The above cases are the only cases relied on by the Government below where the question of delegating legislative power was raised in brief or argument or discussed by this court. And the facts and situation of each show conclusively that unlike the case at bar it was impossible for Congress to do the thing in any other way.

Superficially it may seem strange that the power to fix Railroad rates by means of the Interstate Commerce Commission was apparently never directly challenged in this court, as an illegal delegation. But when we consider that the power to charge reasonable rates for public service originated in the Railroad Companies themselves, subject to court review for unreasonableness, and that the right to judicial review for arbitrary and confiscatory action still remains, thus differing in origin and purpose from other delegations, and when we also consider the self evident impossibility of Congress itself fixing all railroad rates, the reason why the able railroad lawyers never claimed it was an illegal delegation of legislative power, becomes apparent.

POINT 5.

The expression in Sub-Section C, "the President in so far as he finds it practicable shall take into consideration * * * ANY OTHER advantages or disadvantages in competition", in itself, renders Section 315 unconstitutional. On account of its presence alone, we submit, this court should declare the section unconstitutional without even considering the question of the unconstitutionality of the "difference in cost of production" formula.

"*Any other* advantages or disadvantages in competition" is a very indefinite, elastic and general expression. It covers anything and everything which makes for business success or failure. It is difficult to think of it as something to be reduced to figures with which to measure the amount of a tariff tax. The use of the words "any other" before "advantages or disadvantages" shows that it was intended to reach far beyond mere cost factors.

It may include a variety of things, such as catchy advertising,—nearness to the central market giving personal contact with large purchasers—esprit de corps—personality in salesmanship—reputation—good will—well known trade names—copyrighted trade-marks—popular fancy for a particular article purchased—executive ability—business management. In fact, about anything and everything the user desires it to mean.

It is to be used "in so far as he finds it practicable." This smacks of legislative discretion. For he decides whether it is practicable to use it or not.

The expression is so indefinite as to mean anything. Had it been stated alone and by itself (and not under the cloak of a method of finding cost differences) no one would have seriously contended Section 315 was constitutional.

Shall this elastic formula of advantages or disadvan-

tages in competition become constitutional merely because it is stated as a method of finding cost differences? If so, the tail would certainly wag the dog.

Basing a tariff rate upon supposed differences in advantages or disadvantages in competition is on its face not a *fact finding* process.

Executive fixing of new tariff rates upon differences in production costs is unconstitutional because involving discretion and judgment, choice between different results, at every stage, *but basing them upon "any other advantages or disadvantages in competition" is unconstitutional on its face.*

We therefore submit that even if the difference in cost of production formula was a mere fact finding process (which it is not) the inclusion of the words "any other advantages or disadvantages in competition" in itself makes Section 315 unconstitutional.

Such a holding avoids the necessity of deciding the unconstitutionality of the difference in cost of production formula standing alone.

In attempting to avoid the absurdity of using differences in "advantages or disadvantages in competition", as a mystical method of finding cost differences, Senator Walsh moved to strike out sub-section "c" (Congressional Record, August 11, 1922, Vol. 62, Part II, 67th Congress, 2nd Sess., p. 11226, etc.).

(In answer to Senator Smoot.)

Mr. WALSH of Montana. If the Senator will allow me, I enter into no controversy with him upon that matter at all. I agree with him that the rule which the Senate has announced in the bill, the differences in the cost of production, is a thing that can not be ascertained. There is no way in which it can be done. But the difficulty about the matter is that the Senate has already declared its purpose to make that rule. Now, we can not extend that rule by saying the cost of production as hereinbefore declared

shall be not only the cost of production but something else besides. The two provisions would be entirely inconsistent. I submit to the Senator that he must go back, if he intends to do that, and remodel the language which has already been agreed to, make it more general in its terms, and then, of course, he can make subdivision (c) as specific as he cares to make it.

Page 11228:

THE PRESIDING OFFICER. The Senator from Montana moves to strike out, as the Chair understands, all of subdivision (c) down to and including the word "competition", in line 5 on page 5, of the amendment of the Senator from North Dakota.

Mr. WALSH of Montana. Exactly. I do that because, according to my understanding, that is entirely inconsistent with the amendments heretofore adopted declaring the difference in the cost of production to be the basis for fixing the rates by the President. I do not care to debate it, but I ask for the yeas and nays.

In supporting Senator Walsh, Senator Jones said:

Page 11227:

Mr. JONES of New Mexico. Then we have this situation presented as I see it: We can not directly ascertain the cost of production in this country or abroad, but through some sort of *legerdemain* we find out prices here and abroad, we find out the profits here and abroad, and we find out something else, and then we get at the cost of production. Is that the certain and fixed basis which the Senator from Wisconsin intended to establish as the one which must be used by the President in fixing rates? Did not the Senator from Wisconsin earnestly urge that the act would be unconstitutional unless we had a certain mathematical measure, unless it were made definite and certain? But the provision, as pointed out by the Senator from Montana, destroys the very certainty for which the Senator from Wisconsin pleaded.

Attorney General Sargent in an opinion rendered to the President, February 2nd, 1926, ruled that the expression in clause (4) subsection (c), "any other advantages or disadvantages in competition" permitted the use of "transportation costs to a common market."

Among other things he said:

"Subdivision (c) provides what factors shall be taken into consideration by the President in determining the differences in the foreign and domestic costs of production, and the proper rates of duty to equalize the same. It is therein provided that 'in ascertaining the differences in costs of production * * * the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in cost of production * * *.' If the Congress had intended that only the actual costs of production or fabrication at the places of production should be taken into consideration, it need have gone no further, but subdivision (c) continues by authorizing the President, in so far as he finds it practicable, to take into consideration, (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, etc.: and '(4) *any other advantages or disadvantages in competition.' If differences in transportation costs result in 'advantages or disadvantages in competition' the President is directed to take such differences in transportation cost into consideration, in so far as he finds it practicable to do so.*

The argument is advanced that clause (4) has reference only to clause (3), and is in fact but a continuation of clause (3), but this contention can not be sustained. 'When several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.' (Porto Rico Ry. Co. v. Mor, 253 U. S., 345, 348, and cases cited.)

It is well settled that in construing a statute, the intent of the legislature is to be determined, if possible, from the language used in the act. (Moore v. United States, 249 U. S., 487, 489; United States v. Standard Brewery Co., 251 U. S., 210, 217.) And that this intention must be adduced from the entire statute and not from a part only. (United States v. Ninety-nine Diamonds, 139 F., 961, 963; Railway Commission v. C. B. & Q. R. Co., 257 U. S., 563, 589.) It is also equally well-established that a statute should be construed to give effect, if possible, to all of its parts; (Market Co. v. Hoffman, 101 U. S., 112, 115; United States v. Lexington Mills, etc., Co., 232 U. S., 399, 410; United States v. Standard Brewery Co., 251 U. S., 210, 218.)

* * * * * * * * * *

1. By Section 315 (a) the President is directed to investigate and ascertain the "differences in costs of production" of foreign and domestic articles, and to increase or decrease the statutory rates of duty, within the limitations fixed by the statute, to equalize such differences.

2. Section 315 (c) enumerates the factors which the President shall take into consideration in ascertaining such differences in costs of production, and in fixing the proper rate to equalize the same. In the performance of this statutory duty he should, by virtue of clause (4) subdivision (c), take into consideration, in so far as he finds it practicable from an analysis of the facts in each case, costs of transportation, whenever it is shown that such costs or differences therein, as between foreign and domestic articles, constitute an advantage or disadvantage in competition between the foreign and American producers.

Respectfully,

JOHN G. SARGENT,
Attorney General.

The PRESIDENT,
The White House."

The court below makes the fatal admission that the difference in cost of production at home and abroad cannot be precisely established, and further that a discretion is bestowed on the President as to HOW he shall find such cost differences.

At Rec. 93 the Court of Customs Appeals says:

> "The statements of many persons are cited, some of whom are past and present members of the United States Tariff Commission, to the effect that it is impossible to *precisely establish* the cost of production of an article. *This may be conceded.*" (Italics ours.)

They mean, of course, the *difference in cost of production at home and abroad.* That logically is an admission that the legislative choice between different results, involved in the legislative process of making a new rule for the future, is necessarily involved in the President's action.

The attempt to qualify the admission by the further statement that

> "It is likewise impossible to ascertain, aside from the realm of mathematics, with scientific accuracy, most of the things upon which our lives and human governments depend,"

does not avoid the fatal concession.

Most of the uncertain things upon which our lives and human governments depend cannot be committed to an executive to find as part of the legislative process. The Executive can only be commissioned to find facts and only such facts says Prof. Willoughby, as may be *precisely stated* by the legislature and *certainly ascertained* by the executive.

Willoughby on the Constitution, Vol. 2, page 1319, explaining the rule decided in Field v. Clark, says:

> "The doctrine thus declared is without objection so long as the facts which are to determine the ex-

ecutive acts are such as may be precisely stated by the legislature and certainly ascertained by the executive."

Again (R., 88), the Court of Customs Appeals, says:

> "It will be at once conceded, on a reading of Section 315 (C) that a very broad latitude is given to the President in making such findings of fact. The various factors named in the sub-section are to be used by him 'in so far as he finds it practicable.' A consideration of this language, taken with clause 4, 'any other advantages or disadvantages in competition' makes it manifest that the Congress intended to give to the President and to the Tariff Commission prosecuting the same inquiry discretion as to the means to be employed in ascertaining the fact."

And (R., 95) they say:

> "An analysis of Section 315 discloses that the President is not therein given any discretion as to what he shall do, but only as to how he shall do it."

These again are fatal admissions. For, as the choice of means is bound to affect the result, these statements admit the legislative discretion is exercised by the President in making his findings under Section 315.

POINT 6.

The Countervailing Duty cases Downs v. U. S., 187 U. S., 496, and Nicholas v. U. S., 249 U. S., 34, do not support the legality of Section 315.

No issue of delegating legislative power or taxing power was raised, in the countervailing duty cases. And, of course, no such issue was discussed in the Supreme Court's opinions therein.

In countervailing duty Congress itself provides that whenever any country gives a bounty, rebate or grant upon the exportation of merchandise dutiable under our tariff, an additional duty *"equal to the net amount of such bounty or grant"* shall be levied on such merchandise upon importation here.

For uniformity of departmental practice in the various ports of the United States the duty is imposed upon the Secretary of the Treasury to find out the amount of any such foreign bounties and declare them, and to make regulations for their assessment and collection.

In so doing the Secretary looks at the foreign law to find out if any such bounty has been given and the amount of it, as fixed by said foreign law.

If the foreign law gives it, it is there in the law, a simple existing fact, to be found when he searches for it.

In the Nicholas case the English law as quoted by the Supreme Court (249 U. S., 36), reads as follows:

> "It is provided that 'in consideration of the loss and hindrance caused by excise regulation in the distillation and rectification of spirits in the United Kingdom' there shall be paid 'to any distiller or proprietor of such spirits on the exportation thereof from a duty-free warehouse or on depositing the same in a customs warehouse * * * the allowance of two pence per gallon * * * and to any licenced rectifier who * * * has or shall have deposited in a customs warehouse spirits distilled and rectified in the United Kingdom the following allowances: * * * Three pence per gallon, and on spirits of the nature of spirits of wine an allowance of two pence per gallon. * * *' "

Thus the amount to be given or remitted on export is clearly stated, as it must always be, and thus constitutes a very simple fact to be always found, by the Secretary. There was no difficulty or contention about that. The sole

contention was, that considering what happened to those distillers who sold in England there was no advantage "bounty" or "grant" to those who exported.

But this Court said that the fact that a "grant," in perfectly definite amount, was actually given upon export was enough, and sustained the legality of the countervailing duty in the amount the foreign statute fixed for the export grant.

There were no complicated findings there, nothing comparable in any way to the operation of Section 315.

In Downs v. U. S., 187 U. S., 496, the same kind of question was raised. There was no difficulty in determining and no dispute about the amount which the Russian exporter received when he exported his sugar. This was clearly stated in General Appraiser Somerville's opinion for the Board of General Appraisers where the case arose when he said (T. D. 22984; G. A. 4912):

> "It is not denied by either party to this suit that if in fact any bounty or grant was bestowed the Secretary's finding as to the amount was correct."

The whole contention of the importer was that under the complicated paternalistic Russian system of controlling their sugar industry, the exporter, when he got his rebate, was no better off than if he had sold his sugar at home.

The Court held, page 514:

> "But the fact that he receives the same amount, whether the goods are exported or sold at home is not the proper test whether a bounty is paid upon exportation."

* * * * * * *

Page 516:

> "Therefore we hold that the Government of Russia does secure to the exporter of that country, as the

inevitable result of its action, a money reward or gratuity whenever he exports sugar from Russia."

Thus it clearly appears that there was no claim whatsoever of any uncertainty or difficulty about gathering, from the terms of the foreign statute, the amount of the grant or bounty given. And our opponents are in error when they claim that the Secretary made difficult or complicated findings of fact and weighed or compared competitive conditions in the trade of either country, in order to determine the amounts of said bounties.

We are at a loss to see how these two decisions of the Supreme Court as to what constituted a bounty or grant under the countervailing duty law, no question of delegating legislative power, or taxing power, being raised or discussed, can be considered supporting authority for the constitutionality of Section 315, as claimed by the Court of Customs Appeals.

POINT 7.

The appraisement cases so much relied on by our opponents and by the court below have no place in this discussion.

The action of the appraiser (or the Board of Reappraisement) in applying an ad valorem provision of a tariff act *to a particular importation* was final as to the amount of the foreign market value. Yet such appraisement of the value of a particular parcel of merchandise on the day of shipment could nevertheless be attacked on protest for an error of law committed, or because there was no evidence to support the conclusion reached, i. e., because it was a mere arbitrary fiat.

From this arose the Appraisement cases such as Auffmordt v. Hedden, 137 U. S., 310, Passavant v. U. S., 148 U. S., 214; Passavant v. U. S., 169 U. S., 16; Stairs v.

Peaslee, 59 U. S., 521 (18 Howard); Muser v. Magone, 155 U. S., 240, and similar cases, where it was threshed out how far such judicial review of the appraiser's action extended, and what relief could be given under it. These legal controversies have, of course, nothing whatever to do with the question of delegating legislative power or taxing power involved in the case at bar.

But our opponents, faced with the novel revolutionary character of Section 315, seek to becloud the issue and to transport this novel flexible process back to the time of the fathers, soon after the adoption of the Constitution, by claiming that the appraisement of a parcel of merchandise is analogous to, and therefore authority for, the President's action under Section 315. They then cite these appraisement cases as proof of such comparison.

Nothing could be more far fetched, yet because the court below adopted this contention and cited the Appraisement cases as authority for the legality of Section 315 we are compelled to discuss it. We cannot tell whether such false analogy will be claimed before this court. If it is, the answer is a simple one.

The distinction between executing or applying an existing ad valorem to a particular importation on the day of exportation, and making a *new* rate of taxation to apply in the future by changing an existing tariff rate, should be self evident to everybody. The mere statement of what the two processes are should be sufficient to show their complete difference.

However, having dragged the Appraisement cases into the discussion, much is then made of the fact that cost of production, in a single factory on one certain day, was sometimes used by the appraiser, when nothing else was available, to calculate a constructive market value therefrom, by adding certain fixed statutory minima for overhead and profit.

NOTE: This provision never permitted the Appraiser to look for such costs *outside of the shipper's own factory*

until the Act of 1922, of which act Section 315 forms a part.

All this is nothing to the point. It does not touch the issue in the case at bar. The two processes are totally different. They relate to entirely different things. They are used for entirely different purposes. The fact that some kind of cost calculations occasionally crept into finding ad valorem market value would not make the two processes similar in any respect. One still applies an existing rate and the other fixes a new tax rate for the future. The whole claim is an illogical non sequiter. The resort to it illustrates the weakness of the government's case.

Further after having thus forced the Appraisement cases into the discussion, our opponents (and the court below) announce that as the finding of market value by the Appraiser was held by this court not to be unconstitutional for lack of "due process", that somehow mysteriously supports the government's contention here. They seem to foreget that our claim of unconstitutionality in Section 315 is not for lack of "due process" of law but because Section 315 illegally attempts to delegate to the Executive legislative power and taxing power.

At the oral argument of U. S. ex rel. Norwegian Nitrogen Products, Inc. v. U. S. Tariff Commission, March 3, and 4, 1927 (274 U. S. 106, advance sheets), Judge Devries, asserted that the process of operating Section 315 was similar to appraising a parcel of merchandise. The following occurred:

> "Justice Van Devanter: How is it exactly the same? That is only a question here as to the rule that is to be applied—the law; while in case of the appraisement, the rule is the same, the law continues the same, it is a mere ascertainment of whether or not the particular importation is in point of fact within one rule or within another. But here, as I gather from what has been said, the rule is to be applied—

the law is the change and therefore the one was in force as to the matter of applying rates of duty while the other is the matter of making the rule or altering the existing rule to be applied.

"Mr. DeVries: I think your Honor will find on reflection these cases are identical, with this difference, that the finding of the appraiser determines the duty to be laid in the individual case while the finding of the President, assisted by the Tariff Commission, is the determination by the ascertainment of the state of facts—the same state of facts—as to the cost of production which shall be applied to a number of importations.

"Justice McReynolds: The difference between the trying of the case and the making of a law?

"Mr. DeVries: No, each is delegated a power to find the same state of facts which shall determine the question of duty to be laid in the one case upon one importation, in the other case upon a series of importations." (See Certificate of Public Stenographic Reporter, Appendix "P", p. 155.)

This completely eliminates the Appraisement cases from this controversy. Yet in the brief below (p. 41) the Government's counsel made this remarkable assertion:

> "It is respectfully submitted that if Section 315 is unconstitutional all ad valorem duties levied since the foundation of the Government were in violation of the Constitution."

That unfounded and extravagant claim will doubtless not be repeated before this court, although in the Government's brief opposing our motion for a writ of certiorari pages 12 and 13 the Appraisement cases were cited and relied on.

POINT 8.

A non justiciable subject matter such as this cannot be made into a judicial process nor can the ultimate duty be laid upon the courts, by review of this machinery, to take part in fixing the tax rate. Consequently the Interstate Commerce Commission cases which deal with a justiciable subject matter are not in point and are not legal authority for the legality of a flexible tariff.

All through the case below the Government in brief and argument (as well as the opinions of the courts below), have attempted to associate this flexible tariff process with a litigation, and to deal with it as such, in order to claim as authority for their position, the cases dealing with the Interstate Commerce Commission's fixing of rates for a carriers' public services.

Enforcing the right to a reasonable charge for a public service, was a litigable matter at common law, and when transferred to commissions the action taken must always be subject to judicial review for arbitrary and confiscatory action. That is a totally different process from fixing the future tax rate by changing the law necessarily without judicial review of the action taken.

No understanding of the work of the Tariff Commission is possible if one starts with the erroneous notion that an investigation by the Tariff Commission is in the nature of a litigation and therefor similar to the assertion of the *right* to pay or collect a "reasonable" charge for a public service.

In all litigation, whatever the particular form or purpose, the leading idea is that of a legal person, claiming to be vested with a specific right coming before a tribunal to show that some other person has infringed, or is about to infringe, that right. Litigation involves the concept of actor and reus, and of a right infringed or a duty

broken. But an investigation by the Tariff Commission under Section 315 is not for the purpose of ascertaining whether somebody's right under the law has been infringed. It is for the purpose of ascertaining whether a change in the law shall be recommended to the President by the Commission.

There is nothing analogous to a judgment or decree or even to an order of the Interstate Commerce Commission, which order declares a rate in conformity with the shipper's right to pay, and the carrier's right to demand, a "reasonable" charge for the public service rendered or protects against "unjust" discrimination, etc.

An application for a change in a tariff rate is valuable not so much for what it alleges as what it suggests. It is wholly unlike a pleading. The Tariff Commission rightly does not examine an application for the purpose of determining whether or not it states sufficient grounds for instituting an investigation, and then act in accordance with that determination. On the contrary, the Commission correctly treats every application merely as a suggestion drawing its attention to the possibility that in respect to the article mentioned, the differences in foreign and domestic production costs, advantages and disadvantages, etc., may not be equalized by the existing duty.

Before an investigation is instituted the Commission rightly pursues a preliminary (and independent) inquiry of its own for the purpose of ascertaining whether a formal investigation should be undertaken. The subject matter is the supposed difference between costs of production in the United States, and supposed costs of production in the principal competing country as modified by "any other advantages and disadvantages in competition."

It may appear that there is only one domestic producer and only one producer in the foreign country. That would be accidental. Ordinarily American producers may number hundreds or even thousands and so may the foreign. Out of a multitude of such producers the applicant may

be the only one agitating for a change in duty. Yet the costs (and advantages and disadvantages) of the non-petitioning producers are all to be taken into account, just as much as those of the petitioner.

The "investigation" means precisely what the word imports. The hearing is but an incident of the investigation and by no means its controlling feature. The hearing is held after much of the investigation has been done, in order that nothing may be overlooked or omitted. The hearing is not for the purpose of trying out a legal contest between interested parties, whether producers, importers or consumers, but for the purpose of informing the Commission and enabling it the better to report to the President. Since nobody has a legal right to the continuance of any customs duty, the hearing provision involves no question of due process.

After all it is upon the President, and not the Tariff Commission whose action is merely advisory, that Congress has attempted to confer the entire power to alter the customs duties established by the statute.

There is no provision in Section 315 for judicial review of the President's findings when he proclaims a new tariff rate. There could not be. No one can plausibly claim that the courts either directly, or indirectly through review of the acts of a Commission or a President, can be made to take part in fixing the tax rate.

In the Sugar and Linseed oil investigations the Tariff Commission made findings which the President ignored. In so doing he was entirely within his rights and within his prescribed duty. In the Wheat investigation the President proclaimed a rate suggested by three of the Commission ignoring the recommendation of the other three.

It is impossible for the legal mind to contemplate a judicial proceeding to review what the President has full authority to determine under this Section or to decide between his judgment and that of the Tariff Commission, or to go into the question whether there was legal evidence (or any evidence at all) to support his findings.

The hearing provided for does not make a record before the President, who alone acts, for subsequent judicial review. The whole thing is an "investigation" pure and simple. There are no parties in the legal sense; there could not be. No one has a legal right to the retention or to the imposition of a particular tariff rate. The information upon which the President acts can be obtained anywhere or even by private conversation with any one supposed to know.

This fully demonstrates the complete inapplicability to this controversy of the Interstate Commerce Commission cases and State Commission cases; which filled the opinions of the courts below.

They deal with a subject matter—rates for public services—which always has been and still remains a justifiable subject matter through the quasi-judicial functions of the Interstate Commerce Commission, plus the court review of their action, still existing.

In Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, Chief Justice White says:

> "Without going into detail, it may not be doubted that, at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that, when a carrier accepted goods, without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted, either in advance or at the completion of the service, an action may be maintained to recover the overcharge."

A tax is not a toll: "A tax is a demand of sovereignty, a toll is a demand of proprietorship."

Reading R. R. Co. v. Pa., 15 Wallace, 232, 278.

In Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S., page 92, this court said:

> "Under the statute the carrier retains the primary right to make rates, but if, after hearing they are shown to be unreasonable the Commission may set them aside and require the substitution of just for unjust charges."

Further pointing out the judicial review which may be had for arbitrary or confiscatory action by the Interstate Commerce Commission.

Note the Supreme Court's expression "just or unjust charges." There is no such *legal* concept as a just or unjust tariff rate. It cannot be too often repeated that the power to tax is the power to destroy.

POINT 9.

The currency cases do not support the Government position. Cramer v. Arthur, 102 U. S., 612; Arthur v. Richards, 90 U. S., 259; Hadden v. Merritt, 115 U. S., 25; U. S. v. Klingenberg, 153 U. S., 93.

The Congress has a right to place any value for customs purposes it pleases on foreign money. This it did for a long time; arbitrarily declaring in the statute itself that for customs liquidations the British Pound should be worth so much in American money, the French Franc so much, the Austrian Florin so much, and so with other foreign moneys. Later it authorized the Secretary of the

Treasury to proclaim such value for a year and later still from quarter to quarter, thus coming nearer the true value, and being a fairer way of doing it. It was plain that Congress could not pass such a currency valuation statute every quarter. Many months Congress is not even in session.

To thus relax the arbitrary rule and make it less arbitrary was not delegating legislative power or taxing power.

The Secretary either (1) measured the number of grains of gold and silver in a foreign coin—the simplest and most easily ascertainable thing imaginable.

Or (2) if exchange values were to be considered, asked the nearest bank what the rate of exchange with a country having a depreciated currency was on a particular certain day—an equally certain and definite process.

Indeed the present act goes a step further and provides for the customs settlement on the quoted Federal Reserve exchange rate.

It is no wonder that no counsel in the currency cases cited by the Government had the temerity to claim that the question of delegating legislative power or taxing power was involved.

POINT 10.

The Chemical Foundation case is not in point.

United States v. Chemical Foundation (272 U. S., 1), cited by the Government, is not in point. The statute construed was a war measure, to protect the whole people of the country. The Government took absolute control of enemy property, the Alien Custodian acting as trustee. The Government had the right, under the rules of war, to deal with enemy property as if it was its own. Provision was made, however, for certain public sales, unless the President thought otherwise.

This court clearly distinguished the power to the President to provide for private sales, when necessary for the prosecution of the war, from a delegation of legislative power.

Mr. Justice Butler said, for the court:

> "The determination of the terms of sales of enemy properties in the light of facts and conditions from time to time arising in the progress of the war was not the making of a law; it was the application of the general rule laid down by the act. When the plenary power of Congress and the general rule so established are regarded, it is manifest that a limitation upon the excepted class is not a delegation of legislative power."

In other words, enemy property being confiscated *for the purpose of fighting the war,* a limitation for private sale when the President thought that would better prosecute the war, from the class to be otherwise sold at public sale, was plainly nothing similar to delegating legislative power.

The court further said that the Act went

> "as far as was reasonably *practicable* under the circumstances * * *."

And that the Act

> "is a war measure covering specifically, fully and exclusively the seizure and disposition of enemy properties." (Italics ours.)

Contrast that with delegating to the President power to fix the future tax rate under an alleged standard which is no standard, a supposed policy which is indefinite, uncertain and shadowy, under a formula without form, such as Section 315.

ALTERNATIVE POINT.

If our contention that Section 315 attempts to make an illegal delegation of legislative power and taxing power is overruled, then another question of first impression and far-reaching consequences must be decided, namely, whether a levy frankly stated to be for the purpose of protection, irrespective of revenue, is legal.

If this court should for any reason feel compelled to hold that Section 315 is a legal delegation of taxing power to the executive; notwithstanding the fact that all the economists, who have studied it, declare, and all those who operate it admit, it to be an arbitrary, discretionary, guess-work process (see appendix) then, and only then, another vital question of first impression, never before litigated or possible to be litigated, must be decided.

As the dissenting trial Judge said (p. 66):

> "Moreover, the plant before us is beyond the power of Congress even if it is not held to be an illegal delegation of legislative power. For it purports upon its face to make a levy for a private purpose.
>
> "It cannot be denied that a tariff based upon differences in foreign and domestic production costs executes a frankly declared protective policy. Let this phase of the issue be clearly stated. It is whether the levy itself, laid ostensibly for what we call 'protection', and frankly not for the purpose of raising revenue, falls within the definition of the term 'tax', levied to pay the debts and provide for the common defense and general welfare of the United States, for which alone authority is given to Congress.
>
> "The question is whether a levy can be made, not ostensibly for revenue, thus placing the motive of

Congress beyond judicial inquiry, but frankly, and on the face of the statute, for a trade advantage to particular citizens (any revenue raised therefrom being merely incidental or accidental) and still be called a tax laid for the 'common defense and general welfare.'

"The rate of 4 cents per pound upon barium dioxide, fixed by the Congress itself in the Act of 1922, is laid in the familiar form used for the purpose of raising revenue (whatever its incidental effect) since the formation of our present Federal Government. The legality of that rate so levied cannot be contested. To permit the courts to take proof of its effect, and inquire into the motives of the Congress in levying a duty in that form, would upset the Government and transfer powers over legislation and over taxation to the judicial branch. The additional 2 cents per pound, however, is expressly stated, by the Congress in Section 315, as well as by the executive proclamation fixing its amount, and directing its levy; to be levied for the sole purpose of equalizing production costs at home and abroad."

Further, at pages 68, 69, 70, the dissenting trial judge said:

"In South Carolina v. United States, 199 U. S., 437, Mr. Justice Brewer, speaking for the majority of the court, says, at page 450:

By this clause (the tax clause) the grant is limited in two ways: The revenue must be collected for public purposes and all duties, imposts and excises must be uniform.

"In the case of United States v. Boyer, 85 Fed., 425, at page 432, Rogers, District Judge, says that the words 'and provide for the common defense and general welfare of the United States' according to the

most liberal constructionist, is a limitation on the taxing power of the United States, and that only.

"In the case of Loan Association v. Topeka, 20 Wallace, 655, Mr. Justice Miller says on page 664:

We have established, we think beyond cavil, that there can be no lawful tax which is not laid for a *public purpose.*

"For conclusive arguments demonstrating that the words 'general welfare' as used in the tax clause grant no power whatsoever to the Congress see (1) statement of George Nicholas, in answer to Patrick Henry, in the Virginia Ratification Convention, 2 Elliott's Debates, 244, 245; (2) Paul Leicester Ford's 'Jefferson', vol. eleven, page 489; (3) the 41st number of the Federalist, written by James Madison, and (4) speech of Henry St. George Tucker, in the House of Representatives, March 3, 1926.

"No court has ever declared this reference to the general welfare' to be a grant of power. None ever will. Certainly, no court will ever say that it grants power to delegate a trust committed by the people to Congress alone.

"Again, a prohibited tax levy or delegation cannot become legal by calling it a regulation of commerce as this Section 315 purports to do.

"If that were so all express and implied limitations upon the power of taxation would be done away, if the particular act affected commerce, as most taxation does, and it was merely called a regulation of commerce. These provisions of Section 315 must stand or fall for what they are upon their face, namely, a levy frankly for protection and the attempted delegation of the power to tax, and not by what they are called. (See Child Labor Tax Case, 259 U. S., 20; Hill v. Wallace, 259 U. S., 44, and Trusler v. Crooks, decided by the Supreme Court, January 11,

1926.) If illegal, as a tax, or as a delegation, the fact that they affect commerce will not save them. * * *

"Neither the doctrine of implied powers, nor the power given to Congress in Sub-section 18 of Section 8 of Art. I, to pass all 'necessary and proper' laws to carry out the powers expressly granted, gives any support to the Government position. Power to delegate to executive discretion the levy of a tax upon the citizen can never be implied from the grant of such a trust to Congress alone. Nor could such delegation ever be 'necessary and proper' as a means of carrying out a trust exclusively committed to Congress. Nor, if there was no delegation of legislative power involved, can a levy, upon the face of the statute for protection alone be a tax for the 'general welfare'."

Opponents fail to see that the section *on its face* (cost of production formula frankly declared) and by the President's proclamation raising the rate here from the statutory rate of 4 cents, by 2 cents additional, per pound, are for the sole purpose of giving protection to a favored class. For they argue (as does the United States Court of Customs Appeals) that Congress has been passing, for years, high tariff statutes for the purpose of protection. Admitting that premise, for the sake of argument only, *we say that no previous tariff act on its face, which avowed its purpose, was for protection.* If it had, it was open to challenge; and that is the reason it has not been challenged. *But here, for the first time, Congress has openly and avowedly declared it in the statute on its face, and, therefore, it can now be properly challenged, and is challenged, on this additional ground.* This Court has held statutes unconstitutional, which, on their face, showed they were not for taxation, but for some other purposes

(Bailey v. Drexel Furniture Co., 259 U. S., 20; Hill v. Wallace, 259 U. S., 44). It is admitted in the opinion of the Court of Customs Appeals (R., 97), that this section plainly *is an effort to afford protection to certain industries of the United States.* The 2 cents additional is not for purpose of revenue.

Loan Association v. Topeka, 20 Wall., 655. We quote (p. 660):

> "With these remarks and with the reference to the authorities which support them, we assume that unless the legislature of Kansas has the right to authorize the countries and towns in that state to *levy taxes to be used in aid of manufacturing enterprises, conducted by individuals, or private corporations, for purposes of gain, the law is void, and the bonds issued under it are also void.*"

Page 662:

> "It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism."

Page 663:

> "The theory of our governments, State and National is opposed to the deposit of unlimited power anywhere. The executive, the legislative, and the judicial branches of these governments are all of limited and defined powers.

> There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Pages 663-4:

> "* * * A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent, imposed by the United States on the circulation of all other banks than the National banks, drove out of existence every State bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, *if there is no implied limitation of the ends for which the power may be exercised.*" (Italics interpolated.)

It has been urged that the words "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers," are sufficient excuse for this delegation. But "proper" means proper within the definite constitutional restrictions, for constitutions are made to restrain governments.

In 41st Federalist, appears a paper of Mr. Madison on this subject, in which he distinctly denies that the words "all laws necessary," etc., are to have a comprehensive meaning, but says that they have a restricted meaning, and shows that the words "general welfare" are not a grant of power.

As a delegation of legislative-power and taxing-power is prohibited by the provisions limiting such power to

Congress, a right to delegate such power to the Executive, cannot be implied. Such implication would destroy the prohibition, the implication would have nothing to rest on. There is no such doctrine of implied powers.

The court below makes a labored and ineffectual attempt to show that section 315 is merely part of a general revenue law with incidental protection, whereas Section 315 is in fact and law a separate independent provision differing in every particular from the fixed rates of the dutiable section of the act. They then fall back upon the commerce clause in an attempt to justify the legality of the protective formula stated on the face of Section 315.

THE COMMERCE CLAUSE GIVES NO SANCTION WHATSOEVER FOR SECTION 315.

The Government's claim, under the commerce clause, that this tax is a regulation of commerce, does not change its nature, nor screen and protect this plan, nor turn it from an illegal delegation into a valid enactment. The words in the section, under the guise of commerce, are merely a *subterfuge to cover* an illegal delegation of the taxing-power.

A tax regulating commerce is still a tax and subject to all the limitations governing taxation; including the "prohibition" against delegation. It is still (unlike commerce rate regulation) the power to destroy. No court can declare it unreasonable or confiscatory. The President cannot regulate commerce. Again, "a regulation of commerce" is a polite name to give a purely protective levy. If bad as the latter, such designation, even if true, will not save it. Otherwise, for every tax affecting commerce and so named, the limitations preventing delegation and preventing a levy for private purposes, are completely destroyed—*reducio ad absurdum.*

Had there been no tax clause in the Constitution could

Section 315 have been enacted under the power to regulate commerce? But even if Congress can tax under the commerce clause alone it can not make a levy for a private purpose. A tax to equalize foreign and domestic cost differences is not in any rational sense of the word a regulation of commerce. Commerce cannot be regulated for a frankly declared private purpose.

The President cannot be delegated the authority to levy taxes for the regulation of commerce any more than he can be delegated authority to levy taxes for the raising of revenue. It is plain therefore that Section 315 as a delegation to the executive gets no sanction from the "commerce clause".

On the other hand, assuming, for the purpose of the argument only, that the Section is a legal delegation, the commerce clause gives it no support or sanction as being on its face for the private purpose of "protection" to certain purely domestic industries. Otherwise the "commerce clause" could be invoked as authority for a direct subsidy out of the public treasury paid to domestic manufacturers to make up "cost differences". Such a duty levied to meet "cost differences" no more affects commerce than such a direct subsidy paid to make up such differences.

The levy of a tax on its face for "protection" under the commerce clause (if taxes can be levied under that clause) is outside the rightful powers of government just as much as if it were levied under the tax clause.

We are dealing here with a *limitation* on the powers of Congress not to delegate to the executive the power of legislation or the power of taxation. This *limitation* is not to be destroyed by an implication expanding the powers which it expressely *limits*.

In Fairbank v. U. S., 181 U. S., 283, this court said:

> "If powers granted are to be taken as broadly granted and as carrying with them authority to pass

those acts which may be reasonably necessary to carry them into full execution; in other words, if the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power of Congress *that prohibition or limitation should be enforced in its spirit and to its entirety.* It would be a strange rule of construction that language granting powers is to be liberally construed and that *language of restriction is to be narrowly and technically construed.* Especially is this true when in respect to grants of powers there is as heretofore noticed the help found in the last clause of the eighth section, and no such helping clause in respect to prohibitions and limitations. The true spirit of constitutional interpretations in both directions is to give full liberal construction to the language, aiming ever to show fidelity to the spirit and purpose." (Italics ours.)

The spirit and purpose of the limitation here is plain; namely, that Congress alone, and no executive, should exercise the legislative and taxing discretion.

> "The power to regulate commerce has no limitations, other than those prescribed in the constitution, but does not carry with it the right to *destroy or impair those limitations and guarantees which are also placed in the constitution* or any of its amendments." (Italics ours.) (U. S. v. Joint Traffic Association, 171 U. S., 505, 571).

So it was held in Monongahela Navigation Co. v. U. S., 148 U. S., 312-336, that if under the power of regulating commerce Congress takes property it must pay just com-

pensation. And in I. C. C. v. Brimson, 154 U. S., 447-449, it was held the constitutional security protecting private books and papers could not be invaded under the guise of regulating commerce.

It therefore conclusively follows that even if Congress can tax under the Commerce clause, such tax must still be laid by Congress itself, without delegation to executive authority, and such tax must still be levied for the "general welfare," and not for a private purpose plainly expressed upon the face of the statute. In other words, the constitutional limitations on taxation still remain.

CONCLUSION.

This is a momentous question; with grave possibilities. It touches root and branch, the constitutional tree, planted and raised, in restricted soil, by the sovereign people. If this can be done, then all kinds of taxation can be fixed by the Federal Executive; thus doing away with checks and balances; thus merging the legislative and the Executive; thus leading to the establishment of a government of men and not of laws, of which posterity will be the legatee.

Such a scheme is not within the intendment of the framers of the Constitution.

How abhorrent the tax-gatherer was, both in this country and England, prior to the Revolution, needs no exposition. Taxation was one of the causes, if not the principal cause, of that conflict. The Colonies and the States could, at will, change their system of taxation. But lodging it in a general government was quite a different thing. Therefore, can it be supposed, noting with what reluctance the States surrendered the power to tax imports, that in lodging and restricting that power, in a Federal Legislature, it was intended that the Executive should have power of and over this taxation; or any other kind?

Our sworn representatives in Congress, have violated our trust, which was given to their stewardship. Fortunately, by our written Constitution, we can turn, in order to preserve the integrity of our political heritage and pass it on unimpaired to our posterity, to our Supreme Court, to act as a bulwark against subversion of our Constitution and our liberty preserved and guaranteed thereby.

Section 315 is economically unsound. It reflects no social urge. It does not take the tariff out of politics. A purely political question like the tariff question can never be taken out of politics.

It attacks at a vital point and practically destroys the underlying principle of our Constitutional system concerning the separation of governmental powers established for the protection of liberty and property. We submit that it is clearly unconstitutional.

Respectfully submitted, as in duty, etc.,

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New York, N. Y., January 26, 1928.

APPENDIX A.

Thomas Walker Page, sometime Chairman of the Tariff Commission, in his book entitled "Making the Tariff in the United States" (Chapter IV, pp. 83-99), says:

> *"The application of the difference between costs as a measure of duties is usually impossible owing to the difficulty of finding what the difference amounts to.* There is much misunderstanding as to what cost accounting can really show. It is true that no manager of any considerable and well-conducted business today fails to record the costs of the business and to make some analysis of them. He finds it desirable to do so in order to stop leaks, to promote efficiency, to exhibit the net profits of the enterprise, and for other purposes. There is a popular assumption that the records thus kept will accurately disclose the cost per unit of the products turned out. In fact, however, this is seldom the case.
>
> "A multitude of questions arise in regard to the items which should be allowed as component elements of cost, and to these the answers are different in different plants and also for different purposes. Shall the owner's salary, for instance, be considered a part of the cost of production; and if so shall he be allowed a salary at an arbitrary rate or shall the particular amount be allowed which he sees fit to claim? Shall the materials used be valued at their market price, or at what it actually cost to procure them? Shall interest be allowed on the value of plant and equipment; and if so is it proper to take the value of the plant as a 'going concern,' or is it better to take as the value for estimating cost the outlay of the owners in acquiring and improving it? Such questions suggest that cost can be made to seem either high or

low by the system of accounting which is followed. It might be possible in time to standardize the system and thus in a somewhat arbitrary way to reach a cost per unit of product in some industries that consist of simple and independent processes resulting in a single product. But such industries are relatively few. Modern industrial processes are commonly so organized and integrated that they contribute jointly to the completion of a number of different commodities. The accountant is usually faced, therefore, with the problem of joint costs, and the solutions accepted are *purely arbitrary* and differ widely from one plant to another.

"Even in a simple pastoral industry, such as sheep husbandry, this problem is encountered. It may be noted in passing that this industry also presents a number of other problems, which arise in determining what are to be accepted as elements of costs. Should rent on the land used and interest on the total investment be regarded as items of cost, and, if so, at what rate? On the other hand, should account be taken of certain indirect but valuable considerations, such as the destruction of weeds or the improvement of the soil; and if so, how can their value be appraised? But aside from any question as to how the total cost is constituted, what is the *basis* on which it can be divided between the wool and the meat produced? The existing tariff law imposes duties at different rates on sheep, on mutton, on lamb, and on several varieties of wool. If these duties are to be measured by the difference between domestic and foreign costs, the total costs of sheep husbandry must in some way be distributed amongst the different products on which the duties are levied.

"The basis of distribution adopted by the Tariff Commission is doubtless as good as any. Thus the Commission reported that Montana during 1919 the

expenses for 82,122 sheep were $9.93 a head. This was made up of labor, interest at 6 per cent on investment, feed, fees and rentals, shearing, depreciation and miscellaneous. It is clear that no important item except shearing was incurred exclusively for a single product. Expenditures for labor, feed, and the rest were made for producing both meat and wool. The Commission divided the joint costs between these two products in proportion to the sheep owners' receipts from each of them. In that year it happened that 61 per cent of the total receipts in Montana came from wool and 39 per cent from mutton and lambs. As the average amount of wool sheared was slightly over eight pounds per head, this method of division showed the cost of wool in Montana to be more than 76 cents a pound. In the other range states it varied that year between 32 cents in Texas and about 49 cents in Idaho.

The fallacy of the method is obvious, since it makes it appear that the smaller the receipts from either product the lower will its cost be. *This is clearly contrary to fact.* Thus a hard winter, with feed scarce and dear, followed by bad weather during the lambing season, compels the flock owner to make unusual outlays to save any lambs at all. In spite of his efforts the lamb crop is apt to be poor and the lambs stunted and unable to make satisfactory development, so that his receipts from them are small. Under such circumstances the commission's system of accounting would show that the cost of the lambs was exceptionally low and that of wool proportionately high; and by a pernicious paradox if the lamb crop were a total failure, the lambs would have cost nothing at all! Conversely, conditions favorable to a good lamb crop would appear to raise the cost of lambs and thereby lower the cost of wool. It should be noted, however, that receipts vary not only with

conditions of production but also with changes in the market, and the price received for lambs is determined by causes quite remote from those that determine the price of wool. Thus a rise for any reason in the price of wool would appear, regardless of the actual outlays incurred, to lower the cost of growing lambs.

"And yet, defective as the Tariff Commission's method of allocating costs may be, there is none that is better. *The truth is that there is no separate cost of producing wool.* There is a cost of growing sheep and for a defined locality year by year it may be found and recorded, but any distribution of the cost among the products of the business is altogether arbitrary. To the sheep owner this is a matter of little moment. He is not much concerned with how much of the cost is to be allocated to wool and how much to lambs. *But to the tariff maker it is a matter of vital importance* if he is to put one duty on sheep and other duties on wool, mutton, and lamb, and if he must measure the duties by the difference between the domestic and foreign cost of producing these several things.

"The difficulty found in trying to establish the cost of producing wool is much greater when it comes to finding the cost of commodities, such as cattle hides, which are the by-product rather than the joint product of an industry. Agriculture presents many similar instances. *How can the cost of raising cotton seed,* for example, on which there is a duty of one-third of a cent a pound, *be segregated from the cost of raising cotton,* on which there is no duty at all? Flaxseed in some countries is a by-product of growing flax; in some countries flax is cultivated for the seed alone. *How is a comparison of costs to be made in such a case?* Straw is a relatively unimportant by-product of wheat, oats, barley, or rye. *On what theory can an independent cost be assigned to it?* Some varie-

ties of hay are grown chiefly as a cover crop, others for their effect on the soil, and there is *no reasonable hypothesis* on which a *specific cost of production can be imputed to them.* Yet all these things are now dutiable.

"In many branches of manufacturing the problem of joint costs is even more confusing than in agriculture. In its study of the dye industry in 1919 the Tariff Commission found that different producers used five separate bases for distributing expenses, namely, the amount of labor directly used on a given product, the cost of the raw material going into it, the amount of superintendence chargeable to it, the sales value of the product, and the capital investment imputed to it. Naturally the costs showed great diversity, and the commission on presenting its report found it necessary to 'strongly emphasize the uncertainty of conclusions drawn from the cost figures in this report, and the possibility of error in administrative action based upon such data. * * * The figures are, however, the most trustworthy and the most significant that can be immediately procured under present conditions in the industry, and in any discussion of the cost of production the tables must be accepted as the nearest approach to accuracy now possible.' It is true that the dye industry furnishes an extreme illustration of the difficulties involved in cost finding. But after all it is only a question of degree, and *the Tariff Commission's frank statement might well be extended to every industry resulting in a variety of products. 'The nearest approach to accuracy possible' must always leave room for 'uncertainty of conclusions drawn from the cost figures and the possibility of error in administrative action based on such data.'* Obviously, the uncertainty of cost data severely contracts the field in which the difference between foreign and domestic costs can be used to measure duties.

"Even if cost data were reliable the fact would remain that there is in every country more than one cost at which any commodity is produced in commercial quantities. From this it follows that there is no such thing as a single domestic cost or a single foreign cost of production for any commodity. A report of the Federal Trade Commission in 1920 showed that in Oklahoma and Texas the cost of preparing a three-year-old steer for market varied on different ranches between $68.20 and $101.67. Even before the war the cost of making beet sugar in the United States differed at the factories all the way from $66.40 to $139.80 a ton. The cost per pound of growing wool (including interest on the investment) as estimated by the Tariff Commission for the range states in 1919 was 32 cents in Texas, 41 in California, 43 in Colorado, 49 in Idaho, 76 in Montana, 36 in Utah, 35 in Washington, and 48 in Wyoming.

"The process of manufacturing the pigment known as lithophone is comparatively simple. In 1919 it was carried on in the United States by eleven companies, who, taken together, produced 145,000,000 pounds. Their methods of accounting were detailed and fairly comparable though there was lack of uniformity in treating individual items, and the Tariff Commission found little difficulty in ascertaining costs for each company in the industry. One company was producing lithophone at 5.29 cents a pound. From this figure the cost rose quite gradually for other companies to a high point of 7.51 cents a pound. A subsequent investigation two years later showed costs ranging between 5.58 and 7.73 cents a pound, a variation equal to 38 per cent of the low cost. In more complicated and widely distributed industries costs when found usually show a far greater variation.

"Causes for this variation are numerous. It often happens that the same product is obtained from materials so widely different that the processes of manipu-

lating them are utterly unlike. Thus potash in 1919 was obtained in the United States from natural brines, molasses, silicate rocks, kelp, wood ashes, the dust of cement mills, and other sources. Sometimes different methods are applied to the same materials. Ferromanganese, for example, made in blast furnaces in the United States was estimated to have an average cost of $159.67 a ton in 1919. It was being made at the same time in electric furnaces at an estimated average cost of $218.94 a ton. Similar differences were observed in the case of other ferro alloys.

"Very often costs vary because of unequal climatic conditions, qualities of soil, advantages of location, or availability of fuel or water power. Quite obviously they are strongly affected by the efficiency of management, which differs widely from plant to plant. Sometimes also the variation is caused by what appears to be a mere element of chance. Two cloth manufacturers, for example, may be equally well situated and equally efficient, using the same materials and practically the same processes so that their products show no appreciable difference in texture or quality. Yet the fabrics turned out by one of them happen to please the public fancy by reason of some peculiarity of color or design, and the mill producing them runs throughout the season at full capacity. The fabrics of the other fail to meet the whim of prevailing fashion; orders for them are small and the mill's output is correspondingly reduced. At the end of the season the costs per mill might approach equality, but the cost per yard of these similar fabrics would show a wide divergence. In 1918 the western half of the cotton belt was visited by a severe drought which so damaged the crop that on many plantations the actual cost of the cotton picked was more than $1.00 a pound. In the Eastern States, on the contrary, the season was favorable, and the cost of much

of the cotton picked was less than 20 cents a pound. *These illustrations suffice to show that variation in costs of production is general, that it can not be compensated by any method of bookkeeping, and that it can not be prevented by any device of human ingenuity*

"There is, in fact, no such thing as a single 'domestic cost of production' for any commodity. There are almost as many different costs as there are producers; and the question arises: which should be taken for comparison with a foreign cost to find a standard for measuring duties? It is obvious that the higher the figure taken the greater will be the proportion of the industry protected. But no one would advocate duties high enough to protect producers whose high costs are due to unwise location, inadequate equipment, extravagant methods, or poor management. On the other hand, if the lowest cost be taken it might well result in no duty at all, for the lowest domestic costs are sometimes less than are the lowest costs abroad.

"Perhaps the advocates of this method of tariff making most commonly have in mind a comparison of the *average* domestic cost with the *average* foreign cost. Now the average might mean either the average cost per unit of the commodity under consideration, or the average cost in the different plants producing it, or the cost that is just midway between the highest and the lowest in the industry. *These three figures would never coincide except by accident, and none of them would precisely meet the purpose in mind.* Consider by way of illustration the operation of averages in the industries already mentioned: The Tariff Commission estimated the average cost per pound of producing raw wool in the range states in 1919 to be 45 cents. A representative of the commission who visited Argentina estimated the average cost in that

country at the same time to be 27⅓ cents. The difference then was 17⅔ cents. But a duty at this rate on unscoured wool would be 12 cents a pound higher than was shown to be needed in Texas, and higher than was necessary in five other range states, while it would fall short by 50 cents a pound of protecting sheep raisers in Montana and by less amounts in Arizona, Idaho, and Wyoming.

"For lithophone the Tariff Commission gave the average cost not by pounds produced but by companies producing it. This average during the first six months of 1921 was 6¼ cents. For half the number of producers the cost was less than this and for half it was more. There is nothing to show what part of the total output was produced above or below the average cost of the different companies. But whatever the average cost per pound may have been, it is clear that a duty based on the average cost of the separate producers would have given unnecessary protection to some of them and would have left others unequally exposed to foreign competition.

"Again, the domestic beet-sugar factories of the United States in 1918 showed an average cost of $130.61 per ton. But the factories producing at a lower cost than this had a greater output than those where the cost was higher, so that the average cost of the beet sugar they all produced was only $109.96 a ton. In that year the average cost by tonnage in Cuba was $78.72. A duty then of $31.24 a ton—or say, roughly, $1.57 cents a pound—would have equalized the difference in costs for half the beet sugar produced in the United States, but for substantially less than half the producers. Now it happens that the highest costs are found in the eastern region of production, that is, Michigan, Ohio, Wisconsin, Indiana, Illinois, Minnesota, and Iowa. A duty, therefore, high enough to protect only the

average would have more sufficed for the mountain states, would have more than sufficed for the Pacific Coast, but would probably have put out of business most of the eastern beet-sugar factories as well as the cane growers of Louisiana.

"It is hardly to be expected then that a committee of Congress framing a protective tariff will accept as 'the difference between foreign and domestic costs' a mere difference of averages and base upon it duties that it believes would fail to protect wool growers in such important centers of the industry as Montana and Wyoming or beet-sugar producers in a region of such great political power as Michigan, Ohio, and the adjoining states.

"It is well to remember, furthermore, that in most industries costs vary from time to time as widely as they vary from plant to plant. Wool, for example, which was estimated to cost 76 cents a pound to produce in Montana in 1919 had been produced for less than 44 cents in that state the year before. *To establish a reasonable average cost, therefore, would require an investigation of protected industries, not for one year only but for a number of years. This would render the proposed method of tariff making impossible until after the lapse of at least half a decade and the expenditure of many millions of dollars.*

"The difficulties of obtaining and verifying costs of production are infinitely greater in foreign countries than they are in the United States. Any investigation of foreign costs would not only encounter in exaggerated form the difficulties found in the study of domestic costs, but would also meet others that are even more serious. *With rare exceptions the ascertainment of such costs with any degree of accuracy is wholly impossible by an agency of the American government.*

"In its inquiries at home the Tariff Commission is empowered by law to compel any person, firm, or corporation to produce its books or papers and to give all pertinent information under oath in regard to the subject under investigation. The commission has no such power abroad. It must depend upon published materials, the general observations of its agents, and such information as foreign producers may be willing to give. But it is quite inconceivable that the manufacturers of any country would tolerate a detailed investigation of their business by the agents of a foreign government which proposes to use the results as a ground for strengthening the position of its own citizens. Trade secrets, as a rule, are more jealously guarded abroad than in the United States. Foreign manufacturers are more dependent than Americans have been on export markets, and fierce competition in international trade has made them secretive in regard to processes, costs, prices, and business connections. They would raise every possible obstacle to the disclosure of the intimate details of their business to men who, though they might be under pledge as government agents at the time, yet may become the employees of their overseas competitors in the near future.

"The difficulty of foreign investigation is indicated by the following question put by Professor Jastrow to agents of the Tariff Commission at a meeting arranged for them with German manufacturers in 1921.

"'It is suggested that German production costs should be ascertained in order to base American tariff rates thereon. I have followed during the last twenty or thirty years the efforts of the German manufacturer to determine accurately the cost of production of the articles he manufactures, and I have failed to find that any one of them has as yet discovered a method by which he could exactly establish his pro-

duction costs. *As we in Germany do not know our costs of production what reason has the United States for hoping to determine our cost of production which we do not know ourselves?* I should like to know something about the methods which the United States may employ to be able to bring this about.'

"This is testimony on competent authority to the impossibility of finding out with accuracy even domestic costs. Of significance also were articles in the German press during this visit of the commission's agents commenting on the suspicion evident among German manufacturers that the information sought might be placed at the disposal of American manufacturers and that the activities of the agents were in the nature of commercial spying. The Secretary of the National Association of German Industries told the agents that the objection of German manufacturers to giving them information was due in large measure to the nature of the questions asked. They considered such matters as construction, speed, the nature and use of machinery, and the like to be trade secrets and felt that they were under no obligations to disclose them to foreigners. Several manufacturers did indeed furnish reports to the commission's agents, but no opportunity was granted to check them by an examination of books or personal inspection of plants. The reports threw considerable light on the state of German industry, but they were quite general in character, and as was to be expected they included in the main such facts only as would show that high American duties were not necessary.

"Indicative of the attitude of French manufacturers is a report of the American Consul at Marseilles under date of November 15, 1922.

"It a meeting held by French manufacturers on this subject at Paris on October 21, 1922, the principal speaker took the attitude that production costs can

not well be set forth by French manufacturers. He said:

"'There can be no question of hunting out or revealing their costs of production. *The diversity of conditions within any industry is such that investigations of this kind could not give results of practical utility*' * * *

"The meeting * * * agreed with the foregoing attitude and decided to collect information showing merely the proportions in which production has become more expensive in France since before the war. Even these data, which can aid the Tariff Commission very little in seeking to render Section 315 operative, are to be revised and interpreted by the French Minister of Commerce before they are made available. * * * They have always resented investigations by American agents into their costs of production; and it is very doubtful whether such investigations if made without their genuine co-operation, will yield results conforming to the necessities of the Tariff Commission under the rigid terms of the act. It is to be recognized that there is some reason in their argument that it is impossible to establish any staple average for production costs in many industries.

"A letter of December 4, 1922, to the Tariff Commission from its agent in France says:

"They are opposed to and will undoubtedly obstruct as much as possible any investigaitons which the commission may desire to make in France. They have informed me that the French government itself has never been able to pass even a census law which would go beyond verifying the number of establishments and workers therein, and that even for fiscal purposes French officials had difficulties in getting at the books of manufacturers and merchants. That it would, therefore, establish a very dangerous precedent to grant the right to a foreign official to verify costs of

production in France.* * * However, to facilitate the work of the Tariff Commission the Government and the National Association would endeavor to supply the commission with all information of a general character, so that it would be spared the trouble of making a research for statistics distributed throughout numerous publications."

The conclusion can not be escaped that it is rarely possible to ascertain accurately the difference in costs of production at home and abroad. To use as the basis of a general tariff act a thing so fleeting, evasive, and shadowy would be neither right nor possible.

(NOTE.—Dr. Page served on the Tariff Commission from Feb. 21, 1918 to Feb. 28, 1923. At the time of his selection as commissioner Doctor Page's qualifications were widely recognized. In addition to holding of high professional rank as an economist and historian he served the Government in 1911 and 1912 on the United States Tariff Board, the members of which were selected by President Taft. Quoted from 7th Annual Report of Tariff Com., page 1.)

APPENDIX B.

The Honorable Chief Justice of this court, when President of the United States, said:

"The difficulty in fixing the proper tariff rates in accord with the principle stated in the Republican platform is in securing reliable evidence as to the difference between the cost of production at home and the cost of production abroad. The bias of the manufacturer seeking protection and of the importer opposing it weakens the weight of their testimony. Moreover, when we understand that the cost of production differs in one country abroad from that in another, and that it changes from year to year and from month to month, we must realized that the precise difference in cost of production sought for is not

capable of definite ascertainment, and that all that even the most scientific person can do in his investigation is, after consideration of many facts which he learns, to exercise his best judgment in reaching a conclusion."

(Copied from Journal of Commerce & Commercial Bulletin, August 20, 1910, and August 29, 1910; also from a public letter, dated Beverly, Mass., August 20, 1910, to Mr. McKinley, Chairman of the National Congressional Republican Committee.)

APPENDIX C.

President Coolidge, when (after consulting other departments and after pointing out how conditions may change during the progress of an investigation) in making his "findings" declining to follow the Tariff Commission's recommendation upon Sugar, describes this process as one involving choice or discretion in the following words (Sugar Report, July 31, 1924, pp. 216, 217):

"It is obvious from the reports that there is a wide *variety of conclusions* which can be obtained, peculiar in this industry, by *alternative methods of interpretation of the same basic data.* This appears to me to be fundamentally due to the wide fluctuations in the cost of production in different years and in different parts of the industry for which averages have been taken. These variations have been as much as 200 per cent, and in itself seems to indicate that a longer period of more stable conditions is desirable before conclusions. For instance, in arriving at a conclusion from the data in hand it is possible to base interpretations either upon the six-year period which embraces in its first four years a time of great dis-

tortion of costs due to inflation and deflation, or it is possible to base conclusions upon either two or three most recent years. It is also possible to arrive at *different conclusions* based on whether we compare costs of different regions during the time of production or during the time of marketing of the products. It is also possible to *vary conclusions* by the different methods of interpretation involved *in advantages and disadvantages in competition.* Furthermore, as the beet-sugar industry is the one for which we must have utmost solicitude, it is possible to *vary conclusions* by the adoption of that industry as the standard or by the inclusion of all other forms of domestic and insular production, and to still further *vary them* by adoption of the costs of the beet industry in particular States." (Italics ours.)

APPENDIX D.

Philip G. Wright an economist of note who has acted as an expert for the Commission in the *Review of Reviews* for November, 1922, page 502, says:

"In many cases the collection of costs is impossible for the simple reason that they do not exist. What, for example, is the cost of producing wool as distinguished from mutton, of hides as distinguished from beef, of gasoline as distinguished from kerosene, lubricating oil, and a dozen other petroleum products? Where costs can be ascertained it is found that no two manufacturers manufacture at the same cost, and the problem of selection arises. Shall it be the highest or lowest, the average or marginal that is to be used for determining the duty? Wages and prices of materials are extremely uncertain guides. In the case of 29 sugar centrals in Cuba, all having the same opportunities for obtaining labor and materials, the

highest unit cost was more than twice the lowest, with the costs for the other 27 ranging in gradation between."

APPENDIX E.

F. W. Taussig, of Harvard, another distinguished economist and former Chairman of the Tariff Commission, in his address on December 9, 1925, before the American Economic Association, published in the Congressional Record of January 4, 1926, page 1051, says:

> "The point which is important for my present argument is that any decision which is finally reached—any figure which purports to state the differences in cost—necessarily involves the exercise of judgment. No exact and certain conclusion can be reached even by the most perfectly conducted investigation. There is always the possibility of choice between different results, according as you select one or another method of averaging, cover one or another period of time, put your marginal produce or your bulk line at a higher or lower point, consider this figure or that to be the representative one. Even the most competent and impartial tariff commissioner will often have to confess that there is no one figure which can be unqualifiedly said to be the accurate one."

APPENDIX F.

Thomas O. Marvin, present Chairman of the Tariff Commission, at page 26 of the Commission's Report on Wheat and Wheat Products, says, among other things:

> "* * * the experts of the commission were compelled to prepare an *estimated* or *theoretical cost* based upon a system of allocating a percentage of milling costs in the proportion of which *receipts* for mill feed bore to *receipts* for flour."

APPENDIX G.

Excerpt from article of Alfred Pearce Dennis, present Vice-Chairman, United States Tariff Commission—"Tariff Review", June, 1927, No. 6, page 196, etc.:

"* * * Then, too, when we attempt to puruse production costs, we are pursuing an *ignis fatuus*. How about the cost of producing particular items on our American farms? How many farmers are familiar with the principles of cost accounting? Again, how about the immense difficulties of obtaining accurate costs on a coal tar derivative produced in an American steel plant as an incident to the coking industry. Here we are obtaining the cost of a by-product.

If the matter of obtaining accurate production costs is a difficult thing at home, where our accountants are working with the cooperation of the producers, how about the difficulties of obtaining production costs abroad? Here we are working uphill against the prejudice, the opposition, and the suspicion of the foreigner who knows, nine times out of ten, that our real objective is against his interest and that what we are after is an increase in tariff on his goods.

Another question—what part shall transportation play as a factor in production costs? We are only interested in the competition of Belgian plate glass when it makes its appearance in one of our principal markets. Shall the cost of production of Belgian plate glass be based on its cost laid down in Antwerp, in New York, or in Detroit, the *principal* consuming market in the United States?

Again, articles to be matched in cost comparison must, in the language of the statute, be like or similar. What does this mean? Does it mean that you can

compare the cost of Swiss cheese made in Switzerland with the cost of Swiss cheese made in Wisconsin? Would you raise the Tariff on Gorgonzola cheese produced in Italy because an imported pound of it tends to displace a pound of Cheddar cheese produced in the United States? Russian caviar is one of the rarest and most expensive foods in the world retailing from $5 to $20 per pound. Is it like or similar, within the meaning of the statute, to the American caviar obtained from the whitefish and Delaware River sturgeon selling for $1 per pound.

Further, when it comes to cost accounting methods, how obtain the costs of producing American caviar? If the allocation method is chosen, as in some of our investigations, the cost of the catch in representative waters must be ascertained and a correct proportion allotted to whitefish and to Delaware sturgeon, and the ratio of eggless to egg bearing fish determined—a task that might reasonably engage the attention of our experts for years.

Again, when it comes to obtaining costs, what costs are representative? Are the costs of producing pig iron in Birmingham, Ala., where the furnaces practically sit astride the ore, fuel and fluxing materials, representative? Or shall we take Pennsylvania mills, where the assembly costs of the raw materials run as high as ten or twelve dollars per ton, as representative.

Another question, when it comes to equalizing costs of production, how about the marginal producers, the people who can only operate at a profit under favorable conditions? How about adjusting the tariff to equalize costs in the case of stagnant, antiquated, mismanaged industry? Is it not fair to ask that geographic, climatic, industrial and technical conditions permit of production at a price which will enable the industry to compete without an excessive amount of coddling?

How about a duty on olive oil, when native oil is produced successfully in but one small circumscribed district with the output representing less than one per cent of the national consumption?

* * * * * * * * *

Not to labor the subject, every case that comes before the Tariff Commission bristles with controversial points and it so happens that the more conscience and intelligence a man puts into an examination of these questions, the less likely he is to go along with his colleagues in presenting an unanimous report to the President.

Suppose the experts of the Commission were able to obtain sound and adequate production costs both at home and abroad. As a practical proposition neither the Tariff Commission, nor the entire weight of Government itself, could compel foreign manufacturers to produce their books and disclose their costs. The French Government looks upon the admission of our cost accountants into France with great disfavor. French manufacturers tell us that their own government would not think of asking them to open their books to government cost accountants. A man's factory, like his home, is his castle.

Light is thus shed on the difficulties of working our flexible tariff. The results of four years of operation have been meager and unsatisfactory. Up to date, 561 applications have been filed for changes in rates. Only 63 investigations have been instituted. Only 23 reports have been completed and sent to the President. Rates have been raised in 13 cases. Duties have been lowered in two cases—both of despicable unimportance, live bob-white quail imported from Mexico, and paint brush handles imported from Canada.

The President has proclaimed no change in five cases and taken no action in three. Certain impor-

tant investigations, such as carbolic acid, plate glass, and lace have been in progress for four years. On the average, it has taken something like two years to get a change in duty."

APPENDIX H.

Preliminary report of the Tariff Commission, No. 58, January 9, 1928, on "Onions"—Problems Presented for Discussion. A typical illustration of what our opponents had the temerity to call a mere fact-finding-process.

The attention of interested parties is particularly invited to the following questions:

1. a. Are the crop years 1925 and 1926 representatives years for purposes of cost comparison?

b. What year or other cost period should be used as a basis of cost comparison?

2. In a comparison of costs of production of late strong onions with Egyptian onions, how should the storage costs of domestic onions, held until the arrival of the Egyptian onions, be considered?

3. a. What losses in transit due to spoilage, sprouting, etc., is normally to be expected with respect to:

(1) Imported Spanish onions—
  (a) in the summer months;
  (b) in the fall months;
  (c) in the winter months.
(2) Imported Egyptian onions.

b. To what extent are these losses in transit anticipated and taken into consideration in making foreign purchases?

c. Table 42 shows a substantial charge for reconditioning, i. e., regrading and packing imported Spanish onions

Is there a similar charge incurred in connection with imports of Egyptian onions? Domestic onions of any type?

4. Discussion is invited as to how far the invoice data given in this report may be taken as indicative of costs of production of onions in Spain and Egypt? Are any adjustments necessary to make the invoice data, as presented, indicative of foreign costs of production?

5. A comparison of New York market prices on imported Spanish onions given in Table 19, with average c. i. f. New York prices given on invoices, indicates that the duty paid invoice price is considerably higher than market quotations. Discuss the reasons for this difference.

6. What is the cost of loading onions on lighters for reshipment from New York to inland points:

7. Since 1924 imports from Egypt have become increasingly important as compared with those from Spain.

a. What was the cause of the large import from Egypt in 1927? Is it probable that imports in 1928 and subsequent years will be greater or less than in 1927?

b. What is the cause of the relatively small import of Spanish onions so far in the 1927-1928 season? State what you think will be the probable course of imports from Spain during the remainder of the present season. In subsequent seasons.

c. A thorough discussion is invited on the evidence in respect to the principal competing country.

8. With respect to Egyptian onions—

a. What proportion of the imports at New York was reshipped to other cities in 1925? In 1926? In 1927?

b. What proportion of imports at Boston was reshipped to other cities in 1925? In 1926? In 1927?

9. With respect to Spanish onions, what proportion of imports at New York was reshipped to other domestic markets in 1925? In 1926? In 1927?

10. Why is it that so few Egyptian onions go west of the Atlantic seaboard?

11. Do imports of Egyptian or Spanish onions have the greater effect on prices of

a. Domestic strong onions?
b. Domestic Bermuda onions?
c. Domestic Spanish onions?

12. Domestic Bermuda onions usually sell at a higher price than Egyptian onions on the New York market. Discuss the reasons.

13. a. Why do imported Spanish onions sell at much higher prices than the domestic Spanish onions?

b. What part of the price premium on imported as compared with domestic Spanish onions, which on the Chicago market averaged $2.51 per hundred pounds in 1926, is due to superior grading and packing? How much to other causes? Specify the other causes and estimate their relative importance.

c. Are domestic Spanish onions, as ordinarily packed, more comparable with imported Spanish onions packed 50 to the crate or 72 to the crate?

d. Should a cost adjustment be made for the difference in grading and packing of domestic and imported Spanish onions? If so, on what basis should such an adjustment be made?

14. a. In which market is the largest consumption of Spanish onions?

b. In which market is the consumption most evenly divided between the imported Spanish and domestic Spanish onions?

15. a. What is the nature of the competition between domestic strong onions and the Egyptian onions?

b. Would it be economical to expand the domestic supply of onions to take the place of imports from Egypt?

(1) By an increased production and storage of domestic late strong onions?
(2) By growing more domestic Bermuda onions?
(3) By raising more early strong onions?

16. a. Should onions of all types be treated as like or similar articles for purposes of Section 315, or

b. Should strong and Spanish onions be classified separately for purposes of Section 315? How should Bermuda onions, some of which come from Mexico and other sources, be classified?

17. Data have been obtained for imported Spanish and Egyptian onions and for three distinct types of domestic onions—strong, Bermuda, and Spanish.

a. Assuming that all onions should be subject to the same duty, what comparison should be made in order to determine differences between domestic and foreign costs of production for purposes of Section 315?

b. Assuming that different types of onions should be subject to different duties, what comparison should be made in order to determine differences between domestic and foreign costs for purposes of Section 315?

* * * * * * * *

CHIEF MARKETS.

Table 13 gives for the twelve largest onion-consuming markets of the United States, statistics of unloads of domestic and imported onions in the years 1925 and 1926. Unloads of domestic onions are classified as to source and as far as possible as to type. The data in this table are subject to the same qualifications as those in the preceding table.

Shipments of imported Spanish onions rarely go farther west than Omaha, Kansas City, and Chicago, but occasionally go as far west as Denver. There are no imports from Spain at Pacific Coast ports.

The data in Table 13 indicate that New York consumes more onions, both imported and domestic, than any other city of the United States. In the consumption of domestic onions only and of domestic and foreign onions taken together, Philadelphia was second and Chicago third in 1925, and Chicago second and Philadelphia third in 1926; in both years Boston was fourth and Detroit fifth. In the consumption of imported onions, Boston was second in both years, and was followed in the order named by Philadelphia, Chicago, and Detroit.

Imports form a larger proportion of the total consumption of onions in New York than elsewhere, even when allowance is made for reshipments. Imports of Egyptian onions form a larger proportion of total consumption of strong onions in New York and Boston than elsewhere. New York leads in the consumption of imported Spanish onions and, like other eastern markets, receives only occasional shipments of domestic onions of the Spanish type. In Chicago, however, both domestic and imported Spanish onions are consumed in large quantities, and consumption seems to be more evenly divided between them than is consumption in any other large onion-consuming center.

(NOTE.—The above is a demonstration as to how choice of the domestic market is bound to affect the final figure arrived at. And how transportation costs will vary according as the seaboard or internal domestic market place is chosen for comparison; also affecting the result and compelling the use of discretion.)

APPENDIX I.

United States Tariff Commission's Report on Wheat and Wheat Products, March 4, 1924 (p. 26); statement by Thomas O. Marvin, present chairman of Tariff Commission:

> "In consequence, the experts of the commission were compelled to prepare an estimated or theoretical cost

based upon a system of allocating a percentage of milling costs in the proportion which receipts for mill feed bore to receipts for flour. As the business is actually conducted, mills merely credit or deduct feed at the current price from their total costs; the higher the price of feed the lower can they quote for flour. According to the testimony of millers, $1 per ton upon mill feed amounts to about 3½ cents per barrel of flour."

II.

STATEMENT BY OTHER MEMBERS OF THE COMMISSION.

Page 28:

"The applications of the data which, in our judgment, warrant and require the foregoing determinations will now be stated.

"With respect to the data on wheat the following alternatives present themselves:

"1. Shall the costs for the year 1923 be applied or shall the average of the costs for the years 1921-23 be applied?

"2. Shall the difference between American and Canadian costs be measured between points representing a weighted average cost in the two countries respectively, or at a point representing a cost at or below which the bulk of the American product is produced?

"3. Shall account be taken of differences in costs of transportation from the points of production to some assumed common market in the United States?"

III.

STATEMENT BY STILL OTHER MEMBERS OF THE COMMISSION.

"It seems clear to us (1) that 1923 costs should be applied; (2) that the difference should be measured

at a point covering the bulk of American production; and (3) that transportation costs should not be taken into account."

Pages 31, 32:

"No one statistical device can be accepted as controlling, the effect of which is to enable the domestic demand for the product to be supplied at a price level which would eliminate a large proportion of American producers.

"Any assumption that the weighted average cost is preferable because it would permit a determination of cost differences with greater mathematical precision is a mistaken assumption. The data collected in this investigation are not the costs of all the hard spring wheat producers in the United States and in Canada. They are the costs of a limited number of representative producers in certain representative areas. Any automatic weighted average of the entire hard wheat production in each country is therefore out of the question. In any event, the conclusion rests upon premises arrived at as a result of a process of representation. Nor is this all. The very object of this investigation is the ascertainment of representative costs. No cost can be representative which does not reflect cost of the bulk of production. If any statistical method or process is not fitted for the ascertainment of a unit cost of the bulk of the domestic product, it is to that extent defective and inapplicable. To adhere to it upon the assumption that it has greater mathematical precision involves an implication of certitude which is delusive."

Page 38:

"But not only would an investigation confined to the costs of the 1923 crop (assuming that it could be

completed by March, 1924), prove futile for the present emergency; it would be equally useless for determining what, if any, duty is normally required to equalize the differences between foreign and domestic costs. For that purpose, the investigation, as in other cases, must cover a period sufficient to indicate the *advantages and disadvantages* in competition which the duty is assumed to measure and equalize. Thus a hurried investigation would be neither an immediate remedy for the present crisis nor an effective application of the statute in general."

Page 40:

"The chief witness who testified in the commission's public hearings with reference to the application of the bulk line was Prof. R. E. Willard, a farm economist of the North Dakota Agricultural College, who appeared in behalf of a committee of farmers, bankers and business men of North Dakota. Professor Willard said in part (stenographers' minutes, United States Tariff Commission, February 18, 1924, pp. 332-335):

"'The question of the bulk line is a rather *theoretical* and *sometimes vague proposition*. Bulk line is usually determined in the range of costs at a point where it is supposed that if the price were placed at that point, it will maintain a certain standard or a certain quantity of production. In other words, in all lines of production there are those who are on the upper extreme in costs and those who are on the lower extreme. The bulk of the commodity that is required for consumption is the object sought for, and if there is too much production the bulk-line point may be lowered in order that the greater number may be in the high cost class, while if there is too little, the price may be established at a point to increase production,

105

and therefore the point would be raised in the scale of costs, and there would therefore be a less number producing at a loss than in the other case. Whether the same bulk-line point should be established in Canada as in the United States, if we were to consider the two propositions, is a matter, it seems to me, that the commission would have to determine, based upon the desired result. If it is desired to increase production in the United States, the bulk-line would be placed low in the scale. * * * It is just the reverse. It would be placed in the scale so that there would be a less number producing at a loss. * * *'"

APPENDIX J.

From published preliminary statements of the Tariff Commission which illustrates the various questions, factors, choices, methods, problems, etc., involved in the actual operation of the cost of production formula. These show conclusively that the process consists of the exercise of a purely "legislative discretion." These are the kind of problems on which they ask for light:

Men's Sewed Straw Hats—Tariff Commission's Preliminary Statement, March 21, 1925:

Page 26:

Comparison of prices. This shows two things: (1) Estimation by the Commission of the jobbers' prices from *retail prices*. (2) "Like or similar." No Italian hats costs found like domestic articles and only a few compared (in the opinion of the Commission) with English ones.

Page 28:

Table 17—Liabilities—Employees' Insurance Fund. Meaning costs by looking up this fund from capital,

including loss of interest thereon. Sub-section (c) provides for labor costs, including wages, and, of course, "advantages or disadvantages." Is the fund a labor cost? It is, of course, comprised in "advantages or disadvantages."

Page 31: Following is a quotation from this page:

"1. *Selling Expense:*

"Shall marketing costs be taken into consideration in this investigation for the purposes of Section 315?

"Are the costs incurred by importers in maintaining representatives and offices in the United States comparable with the costs incurred by domestic manufacturers in dealing directly with retailers?

"Should the purchasing expense of importers be considered a part of the costs of marketing foreign hats in this country?

"2. What method of grouping of foreign and domestic costs should be employed to insure the comparison of hats of similar quality?

"What other grouping, if any, should be employed?

"3. *Distribution of Overhead Charges:*

"Comment is invited on the method of distribution of overhead charges described on page 16."

II.

Cheese, of the Types Known as Swiss Cheese. Tariff Commission's Preliminary Statement, November 10, 1925:

Page 21:

Prices are taken into consideration in determining cost differences.

Page 27:

Cost computed in *three ways,* which the President has to choose from.

Page 43:

Income factors—*Sales, Allocation, Method.*

Page 49:

"It was possible to compute the cost of milk production from the records *only on the farm basis.* The cost of distribution was made by the use of the sales *allocation method.*"

Page 55:

Transportation costs.

Page 68:

Gross farm returns—*farm method.*

III.

METHANOL.

Commission's Preliminary Statement, May 5, 1926.

Page 2. Questions for discussion:

"(1) In this statement, the cost of distilling a cord of wood is allocated to each of the three principal products (crude methanol, acetate of lime and charcoal) on the basis of relative sales return from each product. Is there a preferable method for computing costs of methanol for purposes of Section 315?

"(2) If the relative sales return allocation method is used, should costs for each period for which costs were obtained be calculated on the basis of sales returns for the corresponding period, or for a longer period, e. g., the 3½-year period from January, 1922, to June, 1925?

"(3) Should the refining cost applicable to pure methanol be taken to be equivalent to the weighted average refining cost per gallon of all refined products made as shown in the report, or should some other basis be used?

"(4) Which of the following methods should be used for the determination of transportation charges to refineries or domestic crude methanol?"

Page 4:

Joint Products and By-products.

Page 16:

Prices taken in determining cost of Production.

Page 30:

Use of sales values—*Allocation Method.*

Page 31:

"In order to minimize the effects of temporary price fluctuations and to obtain a more broadly based percentage figure for use in the distribution of costs on the sales allocation basis, for plants whose costs have been used, there has been computed in Table 12 for the 3½-year period from June, 1922, to June, 1925, the weighted average value of sales of crude methanol, acetate of lime, and charcoal, and the ratio of the value of each to the weighted average return from all three products."

Page 34:

"As cost data could be obtained for the first half of 1925 from only one refining plant, no statement of

costs of refining in that period can be made public. Nevertheless, it may be stated that a comparison of the 1924 and 1925 costs for that plant, which is one of the largest engaged in the business, indicates that refining costs in the first half of 1925 were but slightly less than in 1924. For this reason the refining costs shown for 1924 may be considered as representative of both periods. On this assumption all unit costs for refining shown in the tables which follow are those for 1924 only."

IV.

MILK, FRESH; SOUR MILK AND BUTTERMILK; AND CREAM.
Tariff Commission's Preliminary Statement,
March 30, 1926.

Page 5:

Problems for discussion,

Page 5:

"2. Should the domestic study be confined to areas producing milk for those cities in which the imported milk is consumed?

"3. Should the study be limited to areas producing milk of the same grade or quality as that imported?

"4. Table 4 shows that imports of sour milk and buttermilk during 1925 were valued at only $17,000. How shall these commodities be handled in this investigation?

"5. Should all milk costs be on the basis of milk containing a given percentage of butterfat? If so, what percentage of fat content should be considered as standard?

"6. What are the chief producing centers in Canada that export milk to the United States?

"7. In what producing areas in the United States and Canada should cost data be obtained?

Cream:

"8. (a) What are the consuming markets for imported cream?

(b) What is the grade or quality of imported cream and what are its uses in the chief markets?

"9. Should the investigation be limited to areas producing cream for the markets which now consume imported cream?

"10. Should the mid-Western States shipping cream to the Eastern markets be included in this investigation? What is likely to be the future development with respect to long distance shipments?

"11. What are the chief producing centers in Canada that export cream to the United States?

"12. Should all cream costs be on the basis of cream containing a given percentage of butterfat? If so, what percentage of fat content should be considered the standard?

Page 6:

"13. In what cream producing areas in the United States and Canada should cost data be obtained?

General:

"14. Do importers buy milk and cream direct from farmers or from dealers?

"15. Are imported milk and cream bought on yearly or short-time contract?

"16. Aside from price difference, what advantages or disadvantages do importers have as compared with buyers of domestic milk and cream?

"17. How does the loss due to spoilage in the imported trade compare with that in the domestic trade?

"18. To what extent do imports of milk and cream supplement seasonal variations in domestic production?

"19. To what extent do prices of milk and cream in the New York and Boston markets affect prices in other markets?

"20. Maps 1A, 1B and 2 indicate that the milk and cream supplies of the large markets originate to some extent in different zones. Will this difference in source necessitate two separate cost studies for milk—

(a) for areas producing milk primarily for fluid milk consumption, and

(b) for areas producing milk primarily for cream consumption?"

V.

SUGAR.

Tariff Commission's Preliminary Statement, December 1, 1923.

Page 24:

"In approaching the problem of ascertaining the difference in cost of production as between the United States and Cuba, it is necessary to consider the following points which, among others, appear to be of fundamental importance, and to which interested parties are requested especially to address themselves at the hearing:

"1. The choice of the year or years to be used as a basis for cost comparison.

"2. The form of average, if any, or type of cost to be used. (Arithmetical average, bulk line costs, representative costs, etc.)

"3. Treatment of transportation and marketing costs, including the claim for 'contract allowance' to cover marketing disadvantages.

"4. The method of determining the allowance to be made for conversion of raw sugar and various Louisiana grades into refined sugar (refiners' costs, refiners' margins, etc.).

"5. Treatment of invested capital in relation to cost of production.

"6. Claims by producers in all regions of sugar production for inclusion in cost of the losses suffered by them as a consequence of the abrupt drop in sugar prices in 1920 and 1921 on money advanced to planters and growers, not recoverable."

Tariff Commission's Second Preliminary Statement, March 18, 1924.

Page 27:

"Comparison is perhaps more uncertain in the event that some areas are overvalued, whereas other areas are undervalued. In making a comparison of investment charges under these conditions a number of questions must be taken into consideration, such as the following:

1. Have differences in economic, financial and climatic conditions in the various sugar areas within recent years effected the validity of book values of the producing companies to the extent that book values are not strictly comparable?

2. To what extent has the greater proportion of the sale or reorganization of sugar companies in recent years in some areas as compared to others unequally affected the book valuations among the areas?"

VI.

Crude and Caustic Calcined Magnesite

Tariff Commission's Preliminary Statement of May 19, 1926.

Page 3:

"No cost data were sought or obtained through foreign field work, but prices, sales records, and the cost

of distributing magnesite were obtained from the importers of the lower part of the caustic magnesite imported into the United States. All data obtained in the investigation which are not of a confidential nature are herein presented for the information of interested parties."

Page 20:

"*Adjustment of Book Costs.*—Adjustments were made only where cost items as obtained from producers obviously involved expenses which could not for purposes of Section 315 be included in cost of production. Adjustments were made to eliminate from cost such items as federal income tax charges, interest and discount, commissions on inter-company transfers, depreciation not distributed to life of lease, installation and rehabilitation of plant charged to cost instead of investment.

Investment.—The Commission obtained information as to the investment in fixed assets at cost and at depreciated value for 1924 for one domestic company. No similar data were available for other domestic producers, who operate leased properties and pay royalties and rents which have been included in costs. *No investment data have been obtained for foreign firms.*"

Page 22:

"The analyses of imports are based only on entries for which invoices have been liquidated and as to which protests have not been filed."

Page 28:

"*Area of competition.*

The market distribution of domestic and foreign caustic magnesite in this country for the months of

September, October, and November, 1923, and the same months of 1924, was the subject of a special study by the Tariff Commission. The geographic center of consumption for the domestic product was found to be about midway along the Ohio-Michigan border, and was moving south. The corresponding center for the foreign product was near Harrisburg, Pa.; and was moving west. The center for the combined domestic and foreign product was between Cleveland and Youngstown, Ohio, and was moving southwest.

Table 17 shows the relative proportions of foreign and domestic caustic calcined magnesite sold during September, October, and November, 1923 and 1924 in the comparative area."

Page 34:

"1. Are there any substantial chemical or physical differences between Indian, Grecian, or domestic magnesite?

2. Are differences in color of the various high grade magnesite reflected in market demand or prices?

3. To what extent, if any, is the degree of competition between the foreign and domestic magnesite in the principal centers of consumption determined by (a) quality; (b) trade preference; (c) price?

4. What are the important consuming centers and principal markets in the United States for domestic and imported caustic magnesite?

5. Are cost comparisons for the *year 1924* representative of the differences in cost of production in the United States and foreign countries?

6. In the absence of direct evidence from producers' books of the costs of production of caustic calcined magnesite in Greece and in India (no attempt having been made by the Commission to obtain such book costs), is it permissible under the statute to resort to invoice prices of the product mined in each of these

countries for the purpose of arriving at the cost of production in the principal competing country?

7. If invoice prices can be resorted to for the purpose stated in question 6, what elements, if any, included in the invoice prices should be regarded as not included in the cost of production?

8. What methods of computation by way of allowance, deduction, adjustment, or otherwise, should be applied to invoice prices of the imported product in order to ascertain therefrom the cost of production of the imported product?

9. Is it permissible under the statute to resort, in any event, to invoice prices for the purpose of arriving at the cost of production where the data indicate that the spread between the domestic cost of production and the invoice price of an imported article is not such as to permit the maximum increase or decrease under the statute?

10. Should cost comparisons for the purpose of Section 315 be based upon costs of production and of distribution of all caustic magnesite produced in the United States, or should only the costs of production and of distribution of the magnesite actually entering the selected principal competitive market or markets be used as a basis of camparison?"

VII.

Cherries, in their Natural State, Sulphured, or in Brine.

Tariff Commission's Preliminary Statement, May 27, 1927.

Page 3:

I. *Problems confined to cherries, sulphured or in brine, pitted or unpitted.*

1. Is the period covered by the investigation (crop year 1926-1927) a representative period for determin-

ing differences in cost of domestic and imported cherries?

2. The costs of producing Italian cherries are converted into United States currency on two bases: (1) the average rate for the month period May to October, 1926 and (2) the average rate for the crop year May, 1926 to April, 1927. Which of these two bases is preferable for purpose of cost comparison? Suggestions as to any other suitable method are invited.

3. Are domestic and imported cherries of similar variety, type and quality?

* * * * * * *

(a) What use should be made of transportation costs and other incidental charges upon domestic and imported cherries in connection with a cost comparision for purpose of Section 315?

(b) What is the principal wholesale market or markets for domestic cherries in the United States? For imported cherries?"

Page 39:

"*Judicial Decisions.* How is the President going to *classify* in view of the court's decisions on cherries."

VIII.

FLUORSPAR.

Tariff Commission's Preliminary Statement, June 21, 1927.

Page 3. Problems for discussion:

"2. Is there a substantial difference between the calcium fluoride content of domestic and imported gravel spar? If so, what adjustment should be made in cost of production for difference in quality between the domestic and imported gravel spar?

3. If invoice prices be used as evidence of foreign costs of production of fluorspar, should these prices be considered to include (a) imputed interest on investment, (b) foreign producer's selling expense, (c) profit?

4. Is 1925 a representative year for purposes of cost comparison?

5. (a) What are the principal market or markets in the United States for domestic and imported fluorspar?

(b) For what city or cities, as the principal market or markets, should cost comparisons be made for purposes of Section 315?

6. (a) Should the respective costs of domestic and imported metallurgical gravel fluorspar be used as a basis for adjusting the rate of duty on all grades of imported fluorspar?

(b) If not, should gravel, lump, and ground spar be separately classified for tariff purposes?

7. Is the degree of purity of commercial flourspar a sufficient criterion on which to base separate classification for tariff purposes?

8. If, for tariff purposes a *reclassification* by grades is desirable, what method of grading and description of grades would be distinctive and adequate to determine

(a) classification by size of article?

(b) classification by degree of purity?"

Page 30:

"*Depletion of royalty.*—The books of most producers showed depletion set up at rates which checked closely with an average rate for the entire producing district as calculated by the commission from its own ore estimate. For more than 83 per cent of the crude ore mined, depletion rates used by the producers were

accepted; to the remaining production, for which producers' data on depletion were inadequate, an estimated rate was applied. The customary royalty in the Illinois-Kentucky district is $2.50 per ton of marketable spar. Two producers, whose costs are included, paid royalty on the finished product which was reduced to the basis of crude ore and included instead of depletion."

Page 31:

"*Allocation of expense to processes.*—Books of the producers usually show mining expense properly segregated. The expense of sorting, concentrating, and grinding was in many cases not so segregated, so that allocations of expenses other than labor were made by the commission to the separate stages of the process on the basis of labor cost in each stage."

Page 47:

"*Costs at points of Consumption.*—It is possible that comparisons for purposes of Section 315 should be confined to costs of production and transportation of domestic and imported gravel spar, as this grade constitutes about 79 per cent of total sales in the United States, 85 per cent of domestic production, and 78 per cent of imports.

Imported lump spar is not fully comparable in grade with the domestic and there is no certainty that invoice values reflect costs of production.

Ground spar constitutes about 9 per cent of total sales in the United States and 8 per cent of domestic production, but only 2 per cent of the imports of fluorspar. Data regarding the relation of invoice values to costs of production are lacking. Except along the Atlantic seaboard higher delivered costs prevail for the imported than for the domestic ground spar."

IX.

Certain Vegetable Oils.

Tariff Commission's Preliminary Statement
April, 1926.

Page 2:

"Coconut Oil.

* * *

5. Three methods for allocating a part of the cost of crushing a ton of copra to coconut oil are shown on page 15. Which of these or what other method results in a cost most closely approximating the actual cost of production?

6. Should the quantity of imports, the quality of imports as compared with domestic production, or other competitive factors govern in determining the principal competing country for purposes of section 315? Discussion of the legal as well as the economic aspects of this question is invited.

Cottonseed Oil.

* * *

8. Three methods for allocating a part of the cost of crushing a ton of cottonseed to cottonseed oil are shown on page 35. Which of these or what other method results in a cost most closely approximating the actual cost of production?

In connection with this question attention is called to the different products obtained from crushing cottonseed in various countries. For example, in Great Britain oil and cake are the only products, while in the United States and China, oil, cake, hulls, and linters are obtained.

9. Should the quantity of imports, the quality of foreign oil, or other competitive factors govern in determining the principal competing country for purposes of Section 315? Discussion of the legal as well as the economic aspects of this question is invited.

* * *

Soya-Bean Oil.

* * *

14. Since China in 1923-24 experienced an unusual wet season, which resulted in beans of a low-oil content, shall the Chinese costs for 1923-24, or those of 1922-23, or the average of the two periods, be used as the basis of comparison with domestic costs?

15. On page 73 the cost of crushing a ton of soya beans is allocated to soya-bean oil on the basis of the relative sales return from each product. Does this method or some other method result in a cost most closely approximating the actual cost of production?"

Page 27:

"In the United States the products other than oil obtained in crushing cottonseed are cake or meal, hulls, and linters. The oil cake and the hulls serve as cattle feed and for fertilizer; the linters are used for mattresses, felts, low-grade yarns, and in the manufacture of pyroxylin plastics and lacquers, artificial silk (rayon), and gun-cotton, the raw material for smokeless powder."

Page 37:

"*Transportation and other charges.*—The cost of shipping cottonseed oil from China to the United States is another factor entering into the competitive situation between Chinese and domestic oil. Prac-

tically no Chinese cottonseed oil has been shipped to the United States in recent years and therefore no accurate transportation data are available. Shipping charges for cottonseed oil would, however, not differ greatly from those for soya-bean oil, which amount to about $19 per net short ton from Dairen to the Pacific Coast and about $23 to the Atlantic Coast."

Page 56:

Joint Products.

Soya beans contain about 18 per cent of oil. The yield of oil by crushing runs from 10 to 13 per cent. They also yield, as a joint product, oil cake, which, when ground to a meal, is used as cattle or poultry feed or as fertilizing material. Owing to local markets in the United States for meal, the cake is regarded by the producers as the major product and the oil as a minor product. The consumption of soya-bean cake is increasing because of its high rank as a feed.

Because of the demand for both oil and cake in Europe, these countries prefer to import whole beans from the Orient to be crushed after arrival."

X.

NINTH ANNUAL REPORT OF THE UNITED STATES TARIFF COMMISSION.

December, 1925.

Page 16:

"(a) As pointed out in that report, the specific duty can not in any event be increased or decreased more than 50 per cent, no matter what may be the cost difference shown by investigation. In the case of an ad valorem duty, on the contrary, when a 50 per cent increase fails to equalize such cost differ-

ences resort may be had to assessment upon the American selling price. In this case, to be sure, the rate of duty may not be increased, but it is obvious that under certain conditions the duty upon the different and presumptively higher basis of assessment may be greater than the existing duty by more than 50 per cent. This may be the case although the statute has a distinct provision that 'the total increase or decrease must not exceed 50 per centum of the rates specified' by Congress either in the present act or in any amendatory act. *It may also be noted that in the case of ad valorem duties, as in the case of specific duties, the ascertained differences in cost of production can not under the limitations of the statute always be equalized, whether such equalization calls for an increase or a decrease.*

The obstacles in the way of an equal application of the principle of cost equalization may be illustrated by reference to an investigation in which some classes of the same articles were subjected by the same paragraph of the tariff act to specific and to others by ad valorem duties, in such case it is quite obvious that an identical cost difference might result in the imposition of quite different duties." (Italics ours.)

XII.

BUTTER.

Report of the United States Tariff Commission
to the President of the United States,
February 25, 1926.

Page 23:

"Divergent Views On Centralizer Costs.

The views held by Commissioner Marvin, Glassie, Baldwin, and Brossard on this subject may be stated thus:

Although farm-cost data were obtained in certain of the areas from which centralizers draw their supply of cream, no attempt was made to cover all centralizer areas. The reasons for not attempting a general farm-cost survey for all centralizer regions may be stated as follows:

In the first place, the great mass of butter produced by centralizers, in point of grade and quality, is not comparable either with the imported Danish butter or with the butter (similar in grade to the imported) produced by domestic comparatives and small independents. Undoubtedly some centralizer butter is of a grade comparable with the butter just mentioned; but the quantity of such high-grade centralizer butter is relatively small compared with the total production of centralizer butter. Nor is it possible to segragate out of centralizer costs in general the special production-costs of such portion of their butter as might be considered comparable with Danish butter. It might indeed be possible to select here and there a centralizer whose product is habitually of that high grade. Such centralizer product being the exception rather than the rule, these isolated cost data would not be representative of centralizer costs in general, nor would they represent a large proportion of the total production of high-grade butter. Thus their use would be at once meaningless and invalid."

Page 63:

"* * *. A farm, however, is a good deal more than a factory. It is a place to live and I feel that a serious error has been made in putting a money valuation on the service of a farmer and his wife and children in the dairying business. The character of the work itself is intermittent and self-administered. It is impossible in the case of a farmer to state, as in the case of a factory worker, that his time is

valued at so many hours out of every day with so many days of work in every week. I am confident that with the best intentions our farm cost accountants have imputed value to time which has not actually been occupied by the farmer and his family in dairy work, just as they have imputed value to roughages, such as straw, which really have little or no market value."

Page 64:

"3. The majority of the commission, to fortify its indication of a substantial increase in the present duty of 8 cents per pound on butter, has made no use whatsoever of the costs of production of the centralizers of the United States, which produce approximately one-half of the creamery butter of this country, and has inconsistently included cost data for the smaller independents which buy their butterfat from the farmers in the same manner as do the centralizers. Of the plants investigated by the commission's accountants, 72 were centralizers, 32 were smaller independents, and 57 were cooperatives. Similarly, the majority of the commission bases its conclusion, without any attempt to make reasonable deductions, on farm cost data which are not of the same

Page 65:

kind or of comparable accuracy with the industrial cost data the commission has secured in other investigations, and which the commission is apparently not authorized to employ without an amendment of section 315 specifically directing the commission to use such farm cost data, however consciously or unconsciously exaggerated, in agricultural investigations, in place of the present requirement that the commission

shall present genuine cost of production comparisons. Stated otherwise, it is the commission's duty under the law to find the farmer's actual production cost, and not to build up a statistical basis for measuring the price which the farmer in fairness ought to receive for his butter—for which purpose the commissioner's farm cost data are serviceable.

* * * * * * *

In other words, a majority of the commission has cast aside the national cost of producing butter in the United States under the actual conditions under which the butter industry, so far as it is reasonably efficient, is organized in this country, and, instead, has tendered for comparison with Danish cost data certain selected and relatively high United States butter cost data, thereby omitting altogether the cost of producing approximately one-half of the commercial butter of the United States, much of which is comparable and competitive with Danish butter."

Page 81:

"*Feeds, pasturage, and estimated wages.*—Farm-management experts properly use their approximations to determine what are the most profitable lines of farming, but it is submitted that such experts—and certainly the Tariff Commission—should not extend the use of such approximations to purposes for which they are inadequate. The commission's accountants may with justice have believed that it was impracticable to find the cost of production of feeds in the United States and the exact credits which should be charged for the use of farms as homes, but in the absence of such data there should be frank admission that, so far as farm costs go, the commission did not obtain the information required by section 315 for a readjustment of the duty on butter."

Page 83:

"*Absence of farm records.*—Another serious limitation on the use of the farm cost figures obtained in the butter investigation arises from the fact that practically no farmers keep adequate records for accurate cost findings. In any important accounting undertaking the correct allocation of indirect cost to specific articles is always a difficult and expert task. Necessarily, therefore, when there is no bookkeeping record the margin of error is increased. To illustrate, in the present investigation one of the commission's special experts, who is familiar with industrial cost finding, was surprised to learn that reluctant farmers, who happened to be visting a cooperative creamery, were induced to answer from memory certain questions as to their costs and to give approximations which were taken down and used as direct cost data."

APPENDIX K.

Tariff Commissioner Brossard, who had formerly worked as field expert for the Commission, graphically described to the Senate Investigating Committee, pursuant to S. Res. 162, the process by which so-called representative costs were obtained on Wheat and Sugar; how the averaging was done and how the weighted average or bulk-line was applied.

Part VIII, pages 946, 947, 948, etc., of the printed Hearings before the Robinson Committee.

We submit that his testimony can not be read without seeing legislative discretion, judgment, choice between different results, guessing, and arbitrary action, throughout the entire process.

Among other things he said:

Pages 946/7:

"Mr. Brossard: In this investigation we used the the following method: We took the wages of the farm labor that were actually paid, in some instances, on the individual farms, where the farmer had a hired man. Suppose we paid him $40 a month, we allowed the farm owner, if he did the work on the beets, that same wage, or $40 a month, not allowing him anything additional at all for his supervision or his management or his extra or longer hours, but simply allowing him the workmen's wage. That is the method by which the wage was determined for the owner.

The labor of grown children or young men who were at home was prorated on the basis of that wage paid to the hired labor. There has been some criticism of this method of valuating labor, saying that the wages are jacked up because the farmers do not get that much for it; because they are willing to work for less; but, in all fairness, I think that wage has been accepted by all agricultural economists, and it is stated in these reports.

Senator Reed: Did you make no allowance for the other advantages given to hired labor, besides money paid?

Mr. Brossard: Oh, yes. We took an evaluation of the other advantages, which we called perquisites. Suppose the hired farm labor, for example, was given $40 a month and a house to live in; of course, the value of the rent of the house was added to that wage. The same with the rent of the garden spot or anything he might have gotten. It was valuated at the basis of its value at the farm and added to the wage as part of the wage. But, of course, there are two ways of figuring this. They are given in the United States Department of Agriculture yearbooks. The wages are given with these perquisites, or with this food,

laundry, and shelter, and they are given also without food, laundry, and shelter. Naturally, when you include food, laundry, and shelter on some of the farms, because it is actually paid for, you have to make them comparable, and include the value of the food, laundry, and shelter on the other farms, if provided.

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Mr. Brossard: We do it in this way, Senator: There is a wage paid for a boy of 15. They will pay him, say, 75 cents a day in the thinning of beets. Where there is such a wage as that, and a farmer has a boy himself 15 years of age doing the same kind of work that the other boy is doing who is paid 75 cents, we allow the farmer's boy 75 cents a day. That is the way that wage is determined for all children where there is a comparable age of that kind.

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Page 948:

"Mr. Brossard: The horse-labor costs in this investigation were ascertained by a separate investigation of the cost of horse labor. At the same time we were in the field getting the cost of production of sugar beets, we had additional blanks, additional schedules made up for the ascertainment of the costs of horse labor, and from a great many of the same farmers from whom we obtained the data on the cost of production of sugar beets, we obtained also the cost of production of horse labor. In that, we got the cost of feed, the cost of labor put on the horse, the cost of shelter, and all other items and then allocated that cost on the basis of the total time the horse was employed, so that all overhead was apportioned.

Chairman Robinson: What would that amount to, by way of illustration, for a horse during the sugar-beet season?

Mr. Brossard: The total time?

Chairman Robinson: No. The total cost for the horse.

Mr. Brossard: Well, it was not allocated on that basis.

Chairman Robinson: How was it allocated?

Mr. Brossard. We took the total time the horse was employed on the farm during the year, and divided the total cost by the total hours employed, the total hours that the horse worked on the place. That gave us the rate per hour.

Chairman Robinson: What was the rate per hour?

Mr. Brossard: The rate per hour in Michigan was 13.2 cents in 1921, 15.4 cents in 1922; 18.2 cents in 1923; 15.4 cents for the three-year average, per hour. That rate included the indirect horse costs and the direct horse costs. The indirect, naturally, were prorated in the hours.

Chairman Robinson: Well, what would be the cost of the use of a horse in growing sugar beets for a season? What I am trying to get at is the practical result of each cost investigation with respect to horse labor. How much would you allow for a season of production for a horse? Fifteen cents an hour if we worked a good many hours, would make a considerable amount?

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Page 949:

"Then we determined the capital charges, which were divided into a charge for the use of land, and the interest at 6 per cent, on the other capital employed in sugar-beet production, such as horses, machinery, etc.

Chairman Robinson: What was the average charge for the use of land in the State of Michigan?

Mr. Brossard: The average charge for the use of land in the State of Michigan was $9.31.

Senator Reed: That is per acre per year?

Mr. Brossard: Per acre per year.

Chairman Robinson: What was it in Utah?

Mr. Brossard: The land charge in Utah was, on an average for the three years, $15.48 and their interest charge $2.31.

Chairman Robinson: How did that charge for the use of land compare with Nebraska or Colorado?

Mr. Brossard: In Colorado land was charged at $14.23, on the average for the three years, for all areas investigated and $1.77 interest at 6 per cent. on their capital.

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Page 950:

"Senator Wadsworth: May I ask, do you count that 6 per cent. interest on the value of the land as part of the expense of raising the crop?

Mr. Brossard: It has been included in all costs as part of the cost of production. Interest has always been included in the Tariff Commission investigations wherever they could establish the value, for this reason, that under Section 315 especially, and where you have higher capital valutions in the United States of the industries in the United States, capital is often substituted for the cheap foreign labor, and if you included all labor costs in the foreign cost of production and you did not include the investment cost in the United States, you would not have comparable costs at all, because they have a low investment cost and we have a higher investment cost. Or vice versa. If we have a high labor cost, they should have a high investment cost. Capital, it is found, in many of these investigations is substituted for labor or labor substituted for capital, which ever is cheaper. Therefore

in order to get comparable costs at all you must include investment costs as well as your labor costs.

Senator Wadsworth: Then what was your gain? If you were not making this investigation for the purpose of ascertaining costs and then comparing those costs with foreign costs, it would be rather unusual to count, as an element of cost in producing a farm product, interest on the investment, because that is income.

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Page 951:

"Senator Reed: I am somewhat surprised that the average interest rate paid is as high as the figures you give. I had supposed that the effect of the joint stock land banks and the Federal farm loan system had been to bring down the interest rate very much.

Mr. Brossard: It has, Senator. I think it has helped greatly; but you must remember, that many of these mortgages were contracted long before legislation providing for the joint stock land bank and the Federal farm loan bank system was enacted, and they are still paying interest rates of 8 to 10 and 12 per cent.—the rates that prevailed immediately after the war—because the Federal farm loan banks refused to let them borrow money, and these farmers had to go and get the money in some other way.

Senator Reed: Is it possible for them now to refund these loans?

Mr. Brossard: If they were not made for so long a time.

Chairman Robinson: Unquestionably the Federal land bank system has had the effect of reducing interest in all the high-interest areas, but it certainly is true that throughout the farming sections of the South there are thousands of loans being made even now, notwithstanding the existence of the Federal

land bank, at rates of interest as high as 7, 8, 9 and 10 per cent. Most of the Southern States—one of them that I have in mind particularly, and with which I am especially familiar—have a maximum interest rate of 10 per cent., and many of the loan companies still are able to make loans which, when analyzed, bear a rate of as high as 9 and 10 per cent., notwithstanding the competition of the Federal land banks. Many of these loans are now being refunded, but new loans are in some instances being made at the higher rates of interest by the loan companies. It is a somewhat anomalous condition, but it exists to my personal knowledge.

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Page 959:

"Mr. Brossard: In the United States; and what information there was available of a similar character for Canada. We had it charted and put together for this preliminary study, and then the matter was submitted to the advisory board and a report was prepared by the experts in a preliminary way, showing the plans of the investigation as they had drawn them up, calling for an investigation in the field in the United States and Canada. *Areas were selected* in the United States, in the States of Minnesota, North and South Dakota, and Montana, and the prairie Provinces of Canada, because that was the hard spring wheat section.

Of course, we had to decide right then and there the costs of what wheat we were going to compare. *We could not begin to get the costs of all the wheat growers of the United States. That was a total impossibility,* and the problem was with Canadian imported wheat, and the Canadian imported wheat was hard red spring wheat. Then the question arose with the experts of the staff as to whether we should take

in the United States the costs of production of only *hard red spring wheat,* because that was the wheat directly comparable, and which was being substituted for in the milling processes by the Canadian wheat. So the experts of the staff were unanimous. I think, in the agreement that since the *imported wheat* was *hard red spring wheat* that the investigation should be limited to the hard red spring wheat areas of the United States, and, therefore, it was excluded, and the investigation was limited to the four States growing hard red spring wheat and the Prairie Provinces of Canada.

Then we *selected* the *areas* in these four States, and and in the prairie Provinces of Canada, with respect to the type of farming, so that we got a representative farm cost there; and all the conditions of farming in Canada and all the conditions of farming in the United States were included in this cost study. We took sufficient records in each one of these areas to get a *representative* sample, and the *areas* were all blocked out very carefully, showing what the limits of each area were and how many records we were to get in this particular area in order to get a representative sample of that area; and it was squared off and blocked off like that in order to get the total wheat area included, and representative costs."

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Pages 966-7:

Chairman Robinson: I think you did show a very small profit to the sugar-beet grower, notwithstanding a very large allowance made, or what I call a large allowance, for the use of the land. You show a small profit, notwithstanding that. But if you had showed a less allowance for the use of the land it would have resulted in a larger profit to the grower?

Mr. Brossard: Naturally, if the costs are reduced

and you get the same amount for the product, your profits are greater."

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Page 967:

"Chairman Robinson: You allowed rent for the land that was owned by the farmer and upon which he paid no rent?

Mr. Brossard: Yes, sir; the same as we had charged interest on investment.

Chairman Robinson: You proceeded on the theory that it was proper to allow interest on the investment, and that it was approximately accurate to take the rental of the land owned by the farmer and charge that into the cost of production?

Mr. Brossard: Yes, Senator. We did that because of our general theory that for tariff purposes and for purposes of comparison of costs in one country with costs in another, to exclude the item of interest or to exclude the item of rental of land would be totally unsound from the point of view of the *economic comparison or statistical comparison.* It could not be made, really. The same thing was done in wheat; the same thing was done in every other investigation we have made."

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Page 970:

"Suppose, for example, you wanted to use the original cost of land, and we go to, say, Wisconsin, and we got a piece of land 50 years ago and we bought it at $2.25 an acre, or take it a hundred years ago, which may be a little more real at that price; and we stay on that land three generations of the same family, it never changes hands. The present valuation of that land, then, for costs purposes is still $2.25 an acre. But John Jones, right across the road from

this farm buys a farm in 1926, and he pays $225 an acre for his land. The original cost in the one case is $2.25 an acre, plus what additional has been expended on it for improvements which would be very small in that time, it could not be very much in that time; and on the other hand there would be $225.

Now, who is there that will argue that those two costs, one across the street from the other, can be compared for this purpose? Put one of those farms on one side of the ocean and the other one on the other side of the ocean, and you have something like the situation."

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"Chairman Robinson: Your position, then, as I understand it, is that the present value of the land, or at least its present rental value, must be or should be included in the costs of production, even though the land is owned by the farmer who operates it?"

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Pages 971-2:

"Chairman Robinson: Do you mean to say that there is a variation in the cost of production of sugar beets in the United States as much as 800 per cent., or approximately that?

Mr. Brossard: That is apparently correct, Senator; which is not unusual at all for a big industry of this kind."

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Page 972:

"Chairman Robinson: For comparison purposes, did you undertake to work out what would be the cost of production of sugar beets taking the bulk line system?

Mr. Brossard: We did not, Senator.

Chairman Robinson: Have you any idea as to how it would have compared with the results which you actually obtained by taking the weighted average?

Mr. Brossard: I do not know how it would have compared; but I think, Senator, according to our theory of the situation, if we had ascertained *representative* costs for a *sufficient* number of farms in both the United States and abroad, so that our curve could be a perfect curve, that there would be very little, if any, difference between the comparison on the basis of the bulk line cost and the comparison *on the basis of the average cost of production.*

Chairman Robinson: Do you have that information?

Mr. Brossard: I have never tried it, as I said before.

Chairman Robinson: You have never tried it?

Mr. Brossard: I have not tried it on this sugar-beet data.

Chairman Robinson: Which, in your opinion, is the correct method, the weighted average or the bulk line?"

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"Mr. Brossard: Well, there are advantages and disadvantages to both methods. May I explain what I think the differences are?

Chairman Robinson: Yes. If you do not mind, I would like for you to say directly what you think is the better method from the standpoint of an economist, the weighted average or the bulk line, and then you can make any explanation you choose to; and I would be glad to have you make your explanation justify your viewpoint.

Mr. Brossard: Yes, sir. *If we could get* in our investigations *actual* bulk-line costs, then I would say that we should compare the bulk-line for measurement, and I think it would not be very much different

from the result with your average costs of production, Senator. But our difficulty with that method is this: That we have in many of our industries two or three or four, or sometimes one plant. Of course, where there is only one plant you have to take that plant's cost—bulk-line, average, or no matter what—and if there are three or four plants only, then there usually is an outstanding difference; it may not be an outstanding difference in cost for two plants, but there may be an outstanding difference in cost between any of these particular individual plants, and you can not distinguish the cost of production of the several units of the products produced within the single individual plant. The bulk-line method *assumes* that we get a perfect curve.

Now, bulk-line was used by Dr. Taussig and others in *price fixing,* and they could use one of two methods in determining their bulk-line. They could use the *arbitrary* method which Dr. Taussig has explained they did use in some cases as the cut and dried method. That is, they were interested in maintaining production, and so the question with them was to fix a price which would maintain production; and so he *chose* a figure which represented the bulk-line cost. It is the same idea as is included in the representative or marginal cost. If you get the cost of the higher cost producers that will just produce at the price you fix, and you can maintain your production if you desire by offering that price, why, then you have a representative cost, you have a bulk-line cost, and you have also what is termed a 'marginal cost.'

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Chairman Robinson: Explain how the weighted average in any given case is ascertained.

Mr. Brossard: The weighted average—I will take a simple case first.

Chairman Robinson: Yes.

Mr. Brossard: The weighted average, we will say, of the production of a single plant is obtained by taking the total cost of production and dividing by the total output. That gives you a unit cost.

Now, let us elaborate that a little bit. Suppose we have two plants and we have one plant here producing, say, 10 tons, and another plant over here producing 20 tons. To get a weighted average cost of those two plants, we would take the 10 tons, add it to the 20 tons, and that would give us 30 tons, and we would take the cost of this plant and add it to the cost of the second plant, and we would divide the total cost of the 2 plants by the total production of the 2 plants, which would give us a weighted average cost.

You can elaborate that with three plants or as many as are in the classification. *Sometimes we did not have the total amount of the individual plants.* We have the total product, say, of—I will use a sugar-beet illustration—in sugar beets we chose *representative areas,* we had costs in those *representative areas,* but *we did not have a total cost for the whole area.*

Suppose an area represented 500,000 tons, and we had costs for 200,000 tons or 300,000 tons. We *assumed* that our *costs* for the *two or three hundred thousand tons was representative of the 500,000 tons in that area,* and when we combined that area with another area, we weighted the cost in this individual area not by the two or three hundred thousand tons, but by the 500,000 tons.

Senator Reed: You assumed that the unknown plants produced at the same cost as the known plants?

Mr. Brossard: We *assumed* that we had *representative costs of production in this area. If we had not assumed that, Senator Reed, our investigations would be hopeless. We would have to assume it.* We

used the same method, we weighted the total cost per unit here in this area by the total production here, and the other area by the total production there, and in our 24 areas we had weighted average costs of the production of sugar beets as the total costs.

Chairman Robinson: Explain how the bulk line in your opinion would be applied in a given case. You may take any case which you desire to illustrate.

Mr. Brossard: Well, I will take the case where it was applied. Some of the commmissioners applied it in the wheat report.

Chairman Robinson: You did not study the wheat case.

Mr. Brossard: Yes.

Chairman Robinson: I asked you something about that the other day.

Mr. Brossard: Yes.

Chairman Robinson: In that case, which did you think was the better system to apply?

Mr. Brossard: Well, I never made up my mind about until right now. If you want me to answer what I think about it, I will do so.

Chairman Robinson: That is what I asked you. I could not ask you anything else.

Mr. Brossard: I was thinking you mean what had I determined after a study of this at the time the investigation was made, and I had not then made up my mind. I think I should have used the weighted average cost in this case.

Chairman Robinson: What advantages had that in the wheat case over the bulk line?

Mr. Brossard: Where you have the costs of products in which it is difficult to determine a bulk line cost, one definite point which you can call the bulk line, a weighted average is something that you can get and it is simple and it is mathematical. *It may cover up, however, and I think it does in nearly all of*

our investigations, some of the very significant facts, which may not ever be shown. There is no method I know of to overcome the buying of significant facts in weighted averages.

Senator Reed: May I interrupt you? In all this talk about the bulk line, I still have not a clear idea of what is meant. Is it the line of cost under which 51 per cent. of the product is manufactured?

Mr. Brossard: No, Senator. The bulk line has been variously defined, and it has been used in differ ent ways. The bulk line merely, in plain English, is that point at which the bulk of the industry is produced.

Senator Reed: I understand that.

Mr. Brossard: And that would mean perhaps 85 per cent. of the industry.

Senator Reed: Might it? How do you figure the bulk line?

Mr. Brossard: The way the technicians figure it is that it is that point on the curve at which the break in the curve becomes extreme and your costs of production rise rapidly. Usually that is some place beyond the average cost, considerably above the average cost in the ordinary curve.

Senator Reed: Isn't that a very vague measure?

Mr. Brossard: In some cases it certainly is.

Senator Reed: It is still vague in my mind.

Mr. Brossard: *Well, I think it is a difficult thing.* One advantage the average has is that everybody has been working with it *and we have all made averages, and the disadvantage of the bulk line is that it is a new thing that has been created and we have been trying to work with it as economists, and it is an instrument that has been worked with to overcome some of the inherent difficulties of the average. You see, when you get an average you take things which are sometimes not at all alike and the costs vary so*

greatly from lowest to highest that you simply hide up in the average all the significant facts in the industry.

Chairman Robinson: Suppose it were desired to do that, to make the facts found conceal the true facts in the industry. I am not applying this now to any particular case—which one would be employed the bulk line or the weighted average? Which, I mean, could be most easily employed?

Mr. Brossard: Well, I will tell you. *I think the average covers more sins than the bulk line,* because Senator, in order to get a bulk line you have to array your costs—you understand what I mean by array your costs—and that shows your high cost and your low cost and where your breaks are, and if you have a complete and connected and perfect curve then the mathematician could apply his formula and cut the thing at the bulk line where the curve becomes the greatest, and you would have a very accurate and actual representation of the situation.

Chairman Robinson: Honestly and impartially applied, which would approach nearer scientific accuracy, the bulk line or the weighted average?

Mr. Brossard: Do you mean if I had to apply them in all cases or in particular cases? I would make a selection, I think, in different cases, depending upon my statistical data.

Chairman Robinson: You think you would employ the bulk line in some cases, and the weighted average in others?

Page 976:

Mr. Brossard: I am speaking purely as a statistician. I think that some data are so dissimilar that to average them at all and use either a weighted average or a simple average of the data would be too statistically fallacious to be of any use at all.

APPENDIX L.

"A TARIFF COMMISSION AT WORK." Articles by Dr. W. H. Wynne, Williamstown, Mass., in the "Journal of the Canadian Bankers' Association", January and July, 1926, Vol. XXXIII, Nos. 2 and 4, respectively.

Page 196 (January):

> "The difficulties in the way of ascertaining costs of production are considerably greater for specialties than for standard articles, and virtually insuperable where a given set of processes turns out, not a single commodity, but two or more, Mutton and wool; beef, hides, and horn; cotton fibre and cotton seed; a main article of manufacture and its by-products—these are examples of such joint products; and no cost accountant, however skilled and ingenious, can on other than an arbitrary basis, determine for each of these jointly produced commodities its specific cost of production."

Page 421 (July):

> "Determination of the margin between domestic and foreign costs of production, is not a simple, quasi-mechanical matter. On the contrary, as I have already pointed out, the task bristles with practical difficulties. It calls, moreover, for the exercise of *judgment* in the selection of facts, and necessitates a choice among *alternative* bases of comparison, for as different portions of the supply of a commodity are not produced at the same cost, the question arises—which of these varying cost figures shall be chosen for the purpose of estimating the equalizing duty? Scientific considerations point in many cases to *no* clear, unmistakable conclusion, so that there is room, therefore, for the play of personal opinion, bias, preju-

dice. Frequently two (or even more) differential cost figures may emerge, each of which may be defended on plausible grounds. The ardent protectionist may be expected to prefer the higher one, the free trader the lower. This being so, the administration that supports heavy duties will be tempted to appoint to the Board men with high protectionist views, while an administration that is partial to low tariffs will feel disposed to select men with free trade leanings."

Page 423:

"Another very significant fact is that in only eight out of the nineteen reports have the Comissioners been unanimous. In all the rest they have disagreed as to the cost facts, the application of those facts, or both, and have presented divided reports. The main questions over which disagreements have arisen may be reduced to three and stated as follows:

1. Should the cost of transportation to the United States be included as part of the foreign cost of production?

2. What periods should be selected as the basis for comparison—a single year, or a longer period?

3. Should the costs compared be average costs, or bulk-line costs, i. e., the cost at or below which the bulk of the supply of a commodity is produced."

Page 425:

"3. The wheat and butter cases will also serve to illustrate the nature of the third and last of the main points of disagreement among the Commissioners. The choice of different basic periods does not explain the whole of the wide margin between 70 cents—the difference in the cost of producing a bushel of wheat in the United States and Canada determined by one

group of Commissioners, and 42 cents—the difference worked out by the other group. Part of the spread is attributable to the fact that the former excluded costs of transportation and compared bulk-line costs, while the latter allowed for carrying charges and used weighted averages. Clearly it is difficult to establish any definite mathematical rule as to what percentage of the output of a commodity is to be regarded as the 'bulk' of production. The bulk-line may be drawn, therefore, through various points on the cost curve, so that this method of determining costs, whatever its merits, 'invites a wide range of administrative discretion.' It is rarely likely to be applied to yield the same results as averaging, and it is in part due to the use of these alternative methods that the difference in the domestic and Canadian costs of producing wheat was found to be on the one hand as high as 70 cents and on the other only 42 cents.

In the butter investigation also, there was a cleavage in the Commission as to the proper method of ascertaining and comparing costs. Commissioners Dennis and Costigan (the present 'minority' members of the Board, and the chief witnesses attacking it before the Senate Committee) assert that in determining American costs the majority members included a group of high cost producers and excluded a large body of low cost producers, with the consequences that they obtained for the United States a cost figure substantially higher than the one which represents a fair basis of comparison with Danish costs. Applying this method of computation to the Statistics of 1923, the majority members recommended an increase in the butter duty from 8 cents to 12 cents a pound, i. e., the full 50 per cent allowed by law. The minority members, on the other hand, contended that the facts warranted no increase whatever."

APPENDIX M.

Quotation from speech of the Hon. Thomas J. Walsh, in the United States Senate, May 8, 1922:

> "The principle is older than American constitutional law and not peculiar to our institutions, having been announced by Locke in his work on Civil Government thus:
>
> 'The legislature neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have' (Locke on Civil Government, sec. 142).
>
> *It is peculiarly applicable to the taxing power,* the struggle to keep it unimpaired in the hands of the elected representatives of the people, as *against attempts to exercise it by or to transfer it to the Executive being, as is well known, intimately associated with the development of English liberty.* The *jealousy* touching the *exercise of the taxing power* engendered by that historic struggle is reflected *in that provision* of the Constitution which requires that all *bills for raising revenue* shall originate in the *House of Representatives.*
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> * * * * * * * *
>
> So *essential* is the future of redress in the *courts in case of arbitrary action,* that provision is ordinarily made in the statutes conferring such powers upon commissions for a review of its action by some judicial tribunal. The *interstate* commerce act, the *Federal Trade Commission act, and the stockyards act are familiar examples.*
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> * * * * * * * *
>
> But the *action* of the President in establishing rates of duty under the system proposed by the amendment *is not subject to review, however unreasonable and oppressive they may be,* assuming that they are within

the 50 per cent limit imposed by the law. It is in the nature of the taxing power that, being exercised within constitutional or statutory bounds, it is not open to judicial review, being political in character.

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It is agreed on all hands that to justify a delegation of power which might properly be exercised directly by the legislature, it is essential that the law lay down a clear rule for the guidance of the executive officer to which he must adhere in whatever action he may take. As expressed by Willoughby, '*the facts* which are to determine the executive acts' must be 'such as may be *precisely* stated by the legislature and *certainly* ascertained by the executive.' The principle is peculiarly applicable in connection with the fixing of rates by the administrative agency.

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But our differences do not end here. Let it be assumed that the *cost of transportation* within the country must be taken into consideration, a conclusion which the language of the amendments makes all but inescapable. To what point and from what point is it to be calculated—from Butte, Montana, to Duluth, Minn., or from Redding, California, to Pittsburgh, Pa., or from Little Rock, Ark., to Birmingham, Ala.? If the problem were presented to Congress—*if it deemed it wise to entertain the idea—the solution would be relatively simple, as that body may exercise an unrestricted discretion in the matter.* It is not *obliged to be logical.* It might strike a happy medium or make an arbitrary allowance for that element. But the President, having no legislative authority save the power of veto, functioning under a delegation, must proceed according to the rule laid down by Congress.

Nor are we out of the woods yet. If the rule under which he is to act were that heretofore said to be popularly entertained—namely, *the difference in the*

cost of production at home and abroad—he would be confronted with the indisputable fact that such costs vary through a wide range as between foreign countries seeking our markets and as between individual producers both at home and abroad. It is quite generally believed, and doubtless with some foundation, that at present production costs in Germany are extremely low, much lower than in Britain or other countries of Europe competing with her in our markets. What country would furnish the standard upon which the computation of the President would be based? *Or would the true standard be the cost to the most efficient and economical producer of any country, shutting all others out and giving him a monopoly of trade with our country? And, on the other hand, what American producer would provide the standard, the one who is favorably situated with reference to most of the elements entering into his costs, commanding his own supply of raw materials in proximity to his plant, operating under perfect business management with ample credit, or the individual with an antiquated plant, pursuing archaic business methods, and hampered by limited means, or would the computation of the President be based on average costs?*

* * * * * * * *

Bear in mind he must take into consideration the *difference in the prices;* he must take into consideration the difference in the cost of producing it here and abroad, including wages, cost of raw materials, and so on; and then he must take into consideration *any other advantage which the foreigner may have over the domestic producer, including such as arise from laws, regulations, and so forth."* (Italics ours.)

(Note: "any other advantages or disadvantages in competition" remaining in sub-section c.)

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"In the ante bellum, pre-Volstead days German beer had a large sale in Milwaukee, largely on senti-

mental grounds, and many articles of foreign manufacture command a premium here merely because they are imported or because they have a reputation extending through many years. This is particularly true of women's garments and of dress goods generally, if not of all fabrics. All such considerations must be given due weight, either under the general rule or the specific direction quoted above. But it is indisputable that an *impossible task is imposed upon the President* when he is called upon to *reduce such influence to dollars and cents as to any specific item and to fix the rate of duty so as that the 'differences in condition of competition'* having in mind such factors shall be equalized. It will bear repetition that whatever allowance he may make for any of these imponderables that may be present, and any allowance must, in the nature of things, *be no more than a guess his action is final, subject to review by no power, judicial or otherwise."*

* * * * * * * *

"This leads me to remark that the committee, apparently doubtful of the validity of the amendments under review, considered solely as features of a revenue law, took pains to recite in them that they are to be enacted 'in order to regulate the foreign commerce of the United States.' *But it need not be said that Congress can not delegate the authority reposed in it by the people to regulate commerce with foreign nations any more than it can the power to lay and collect duties."* (Italics ours.)

(NOTE.—"Any other advantages or disadvantages in competition" remaining in sub-section c, is the same as the "differences in condition of competition in trade" originally in the bill as introduced into the Senate and referred to by Senator Walsh.)

APPENDIX N.

On January 12, 1928, Congressional Record, Vol. 69, page 1428, Senator Wm. E. Borah said:

"My second objection to the present tariff law was and is because of what is known as the flexible-tariff provisions of the law. If those provisions of the present tariff law are not in contravention to the Constitution of the United States, then I have studied that instrument and our whole theory of government in vain. I think it is a wrong principle. If there was anything about which our fathers were primarily concerned, it was to keep wide apart the sword and the purse and not permit them to be in any sense under the control of the same individual. We have gone a long way, Mr. President, toward giving to the Commander in Chief of the Army and Navy of the United States the power to control the revenues of the Government. It is not a conclusive step, but it is an important step; and, in so far as it is a step at all, it is a vicious one. I feel that the President, the chief executive officer of the Government, regardless of who he may be or what party he may represent, should have no power or authority with reference to fixing tariff duties upon imported articles, save such as is given him in his authority to sign or veto measures passed by the Congress.

If we can give to the President of the United States the power to increase or decrease rates of duty to the extent of 50 per cent, we can give him the power by the same authority to increase or decrease them 100 per cent, and we can place in the hands of the Chief Executive what, in my judgment, is a sufficient control of the revenues of the Nation to make that control effective as to the amount of revenue which shall be collected.

Mr. Caraway: Mr. President, may I ask the Senator a question?

Mr. Borah: Certainly.

Mr. Caraway: If the President may change the rates of tariff duty, he may likewise change the rates of taxation on incomes or anything of that kind, may he not?

Mr. Borah: I should think that the same authority, if it could be found anywhere in the Constitution, which would authorize him to do the one could authorize him to do the other.

It is true, Mr. President, that the Supreme Court of the United States in what is known as the Field case went a long distance in justifying the delegation of what seems to me legislative power; it certainly went further than most members of the profession anticipated it would go before the decision had been rendered; but in that case the court clearly intimated it had gone the full distance. In this matter, however, we have gone an arrow's flight beyond the point which was held constitutional by the Supreme Court in the Field case. It is not only wrong as a constitutional principle, but it is undesirable in practice."

APPENDIX O.

Underwood and Reed of Missouri warned the Senate that differences in cost of production at home and abroad could not be accurately ascertained and consequently the flexible provision conveyed to the President a legislative discretion.

On August 19, 1922, Congressional Record, Volume 62, Part Eleven, page 11598, after the *"cost difference"* had been adopted Senator Underwood of Alabama spoke in opposition to Section 315, he said:

Mr. President, I discussed this feature of the bill some days ago, and I did not intend to say anything further this morning; but I am not going to allow the vote to come after the statement which has just been made by the Senator from Wisconsin without challenging it from my viewpoint.

The Senator from Wisconsin has stated that this bill does not confer the power of taxation on the President, for, he says, the Tariff Commission is to ascertain the cost of production here and abroad, and the President must fix the rate to measure the difference in the cost of production. Theoretically that may be a statement of the case, but, practically speaking, it leaves the President without any great limitations on his power, with the absolute power to fix the rates of taxation within his own discretion, within the limitation, of course, that he can not increase or decrease rates more than 50 per cent of those which are contained in the bill.

In the first place, the Tariff Commission is authorized to investigate and report the facts to the President, but there is nohing in the proposed legislation that confines the President of the United States, in determining what shall be done, to the facts reported by the commission; in fact, it has been stated on the floor—and I think possibly it was the Senator from Wisconsin who made the statement—that the President not only could consult the Tariff Commission but he could consult many other boards of the Government. Indeed, he may consult anybody he desires. When this question comes within the chambers of the Executive office, he may consult the men who are interested in the business; he may consult the manufacturers, or he may consult the importers who desire the rates reduced. On their conclusions, he may fix the tax. However, it is idle to say, when so great a range of difference in the cost of production

here and abroad exists, that the discretion of fixing the tax does not rest in the mind of the Executive.

Mr. President, I sat on the Ways and Means Committee of the House of Representatives for many years; and I have heard the best business men in the country discuss these very details; men who were honest; men who, possibly, were prejudiced in favor of their own business but who were absolutely honest; and yet I have heard these same men time and time again vary over 100 per cent in their estimates as to the difference in the cost of production on a particular article. That is necessarily the case.

Take the pig-iron business. I think the cost of production here in the best furnaces and the cost of production abroad in the best furnaces is about equal; but there is no limitation made in this proposed legislation as to what basis the President shall take in determining the difference in the cost. If he is to take the weaker furnaces, the dilapidated furnaces, in the United States, those furnaces which can only run when the prices of the commodity are pyramided and on extraordinary occasions, and then, on the other hand, go to the foreign market and take the best, the newest, and the most efficient furnaces and make the comparison from the standpoint of our weak industrial children with the strongest and most virile industrial children abroad, of course, he would find a great difference in the cost of production. So that in the end the real basis of fixing these taxes without limitation except that they shall not be raised or decreased more than 50 per cent of the rates provided in the bill, lies in the hands of the President of the United States to exercise as he sees fit.

On the same day Senator Reed of Missouri also said:

Mr. President, not only is it true, as was stated by the Senator from Alabama (Mr. Underwood), that

it is impossible to ascertain differences in cost of production between the mills of our own country, but it even more difficult to ascertain the difference in cost of production in the mills abroad. It follows that these differences which exist between the plants of the various countries can not be reconciled under any rule laid down in the bill. Are we to take the highest cost of production or the lowest cost, or are we to take the average cost? If we take the highest cost of production here and the lowest cost of production in Europe, we will arrive at one result; if we take the lowest cost of production here and the highest cost of production abroad, we will arrive at an entirely different result. If we take the highest cost of production here as the basis of comparison, then our people will be taxed for the benefit of the poorest mill in the United States, and our efficient mills will be granted protection far beyond their needs. If we take the difference between the average cost of production here and the average cost of production there, then the purposes of the bill as proclaimed by its advocates will fail as to all those American manufactures which are above the average line in production costs.

So that, Mr. President, we have set up an impossible rule, an impossible task. Moreover, the difference between the cost of production in one foreign country and the cost of production in another foreign country multiplies the difficulties I have referred to and created a labyrinth through which human intelligence can not find its way.

It has been claimed here that Germany produces much more cheaply than England. If that is true, how is the rule of the bill to be applied? Shall we apply it so that it will fix a special duty upon articles made in Germany? If we do that, we violate our trade treaties with that country. If we avoid violat-

ing our trade obligations under our treaties, then we at once are compelled to take the German standard, and in that case the tariff might be absolutely prohibitive as to the English mill. So that we set up an impossible task, an insoluble task, and we say that when that task is accomplished the President may act.

Mr. President, boiled down, all this bill means is that the President may do whatever he wants to do, or else he can do nothing.

APPENDIX P.

SMITH & HULSE
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Washington, D. C.

Personally appeared before me, ~~a Notary Public in and for the District of Columbia,~~ B. W. DeLoss, who, being first duly sworn, deposes and says that the following is a true transcript of a portion of his shorthand notes taken in reporting oral argument before the Supreme Court of the United States on March 3rd and 4th, 1927, in The United States of America, ex rel. Norwegian Nitrogen Products, Inc., Plaintiff-in-Error v. The United States Tariff Commission, Thomas C. Marvin, William S. Culbertson, et al., Defendants-in-Error, No. 91.

"Justice VanDeventer: How is it exactly the same? That is only a question here as to the rule that is to be applied—the law; while in case of the appraisement, the rule is the same, the law continues the same, it is a mere ascertainment of whether or not the particular importation is in point of fact within one rule or within another. But here, as I gather from what has been said, the rule is to be applied—

the law is the change and therefore the one was in force as to the matter of applying rates of duty while the other is the matter of making the rule or altering the existing rule to be applied.

"Mr. DeVries: I think your Honor will find on reflection these cases are identical, with this difference, that the finding of the appraiser determines the duty to be laid in the individual case while the finding of the President, assisted by the Tariff Commission, is the determination by the ascertainment of the state of facts—the same state of facts—as to the cost of production which shall be applied to a number of importations.

"Justice McReynolds: The difference between the trying of the case and the making of a law?

"Mr. DeVries: No, each is delegated a power to find the same state of facts which shall determine the question of duty to be laid in the one case upon one importation, in the other case upon a series of importations."

B. W. DELOSS.

Sworn and subscribed to before me this
5th day of December, 1927.

ROBERT L. LEHNERT.

(Seal)

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